(24,800)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 168.

WESTERN OIL REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

A. W. LIPSCOMB, CLERK OF THE COUNTY COURT OF MAURY COUNTY, STATE OF TENNESSEE, AS SUCCESSOR IN OFFICE OF H. W. THOMAS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Western Oil Refining Company and A. W. Lipscomb, Clerk of the County Court of Maury County, State of Tennessee, as successor in office of H. W. Thomas, deceased, a manifest error hath happened, to the great damage of the said Western Oil Refining Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of May, in the year of our Lord one thousand nine hundred and fifteen.

[Seal District Court of the U. S., Middle District, Tenn.]

H. M. DOAK,
Clerk of the District Court of the United States for the Middle District of Tennessee.

Allowed by
M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between the Western Oil Refining Company and A. W. Lipscomb Clerk of the County Court of Maury County, State of Tennessee, as successor in office of H. W. Thomas, deceased, a manifest error hath happened, to the great damage of the said Western Oil Refining Company, as by its complaint appears.

We being willing, that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of May, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] H. M. DOAK,
Clerk of the Dist. Court of the United States for the Middle District of Tennessee.

Allowed by
M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

2 UNITED STATES OF AMERICA:

To A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, successor in office to H. W. Thomas, and to the Hon. Frank M. Thompson, Attorney General of the State of Tennessee, his counsel:

You are hereby cited to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Tennessee, at Nashville, wherein the Western Oil Refining Company is complainant and A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, as the successor in said office of H. W. Thomas, is defendant, to show cause, if any there be, why the judgment, or decree, rendered against the said Western Oil Refining Company, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 15th day of May, in the Year of Our Lord, One Thousand Nine Hundred and Fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

3 Supreme Court of Tennessee, December Term, 1914.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Know all men by these presents, that the Western Oil Refining Company, as principals, and The United States Fidelity & Guaranty

Company, as surety, are held and firmly bound unto A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, successor in such office of H. W. Thomas, *and* in the sum of Five Hundred Dollars to be paid to the said obligee, and his successors in office for the payment of which, well and truly to be made, we bind ourselves and representatives jointly and severally by these presents. Sealed with our seals and dated this 14th day of May, 1915.

Whereas, the above named plaintiff in error, the Western Oil Refining Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Tennessee;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, the Western Oil Refining Company, shall prosecute its said writ of error with effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

WESTERN OIL REFINING CO.,
By H. C. TRUE, *Attorney.*
UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MARYLAND,
By A. V. PATTON, *Att'y in Fact.*

Power No. 16967, Dated Sept. 4, 1913.

Approved.
M. M. NEILL,
Chief Justice Supreme Court of Tennessee.

4 Supreme Court of Tennessee, December Term, 1914.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

The Petition of the Western Oil Refining Company.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee:

Your petitioner hereby respectfully sets forth and shows that on the 17th day of April, 1915, the Supreme Court of the State of Tennessee, sitting at Nashville, Tennessee, made and entered a final order and judgment in the above entitled cause in favor of the defendant, and against your petitioner, in which final order and decree, and the proceedings had in this cause, certain errors were committed to the prejudice of your petitioner, the Western Oil Refining Company, all of which appear in detail from the assignment of errors filed in this cause with this petition; and,

That the said Supreme Court of the State of Tennessee is the highest court of said State of Tennessee in which a decision in this suit and matter could be had; and,

That this suit, or cause, is one in which your petitioner sought to recover of H. W. Thomas, County Court Clerk of Maury County, Tennessee, privilege tax to the amount of Thirty Seven and 50/100 ($37.50) Dollars, and costs of a distress warrant issued by said Thomas, Clerk as aforesaid, to collect said tax, all of which was paid by petitioner to said Thomas, Clerk as aforesaid, under protest, after levy on petitioner's property of a distress warrant issued
5 by said Thomas, Clerk as aforesaid, and the same was paid by petitioner in order to prevent a sale of its property so levied on; the said Thomas, Clerk as aforesaid, insisting that petitioner was doing business within the State of Tennessee and was liable for a privilege tax to the State of Tennessee under a certain statute of the State of Tennessee, known as Chapter 479 of the printed Acts of said State for 1909, and particularly section 4 of said Act, and petitioner insisted that it was not liable for said tax in order to carry on the said business for which said tax was demanded and collected as aforesaid; that it was engaged solely in interstate commerce and was protected from the payment of said tax by Section 8 of Article 1 of the Constitution of the United States, and of Section 10 of Article 1 of said Constitution, and that if under said Act of said State of 1909 petitioner was liable for said tax then that said Act or the particular section 4 thereof under which said tax was collected was in violation of said sections of the Constitution of the United States, and, therefore, void.

And a final judgment was rendered therein, as above stated, refusing your petitioner the relief sought in said suit and adjudging that it was liable for said tax and the costs of this cause.

This judgment, your petitioner shows, was erroneous, as shown by, and upon the grounds stated, in the assignment of errors filed herewith.

Wherefore, your petitioner, the Western Oil Refining Company, prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of the State of Tennessee for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the
6 United States.

This the 15th day of May, 1915.

H. C. TRUE,
A. L. DORSEY,
Attorneys for Western Oil Refining Company.

7 Supreme Court of the State of Tennessee.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Now comes the plaintiff in error, the Western Oil Refining Company, and respectfully submits that in the record, proceedings, de-

cision and final judgment of the Supreme Court of Tennessee, in the above entitled matter, or cause, there is manifest error in this, namely:

First. The court erred in holding and adjudging that plaintiff in error, Western Oil Refining Company, was not entitled to recover of the defendant in error, H. W. Thomas, County Court Clerk of Maury County, Tennessee, or his successor in office, the $37.50 paid by it under protest as a privilege tax together with the costs of the distress warrant issued against its property, because plaintiff in error was engaged solely in interstate commerce in the transaction of its business for which said tax was demanded and collected, and said tax, and the payment thereof, was a burden on its said business and a burden on and regulation of interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States, which provides that the Congress shall have power to regulate commerce among the several states.

Second. The court erred in finding and adjudging that plaintiff in error was liable for said privilege tax and was not entitled to recover the same, for under the laws and Constitution of the United States plaintiff in error was not liable for said tax and was entitled to recover the same.

8 Third. The court erred in not finding and adjudging that Chapter 479 of the Acts of the State of Tennessee of 1909 and section four thereof, and particularly the following paragraph of said Section four—under which the privilege tax was demanded and collected of plaintiff in error,—which paragraph is as follows, to-wit:

"Each and every person, firm, partnership, corporation, or local agent, having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, and each and every person, firm, partnership, corporation or local agent using a railroad car or railroad depots for such purpose shall pay a privilege tax," was in violation of the Constitution of the United States and particularly Section 8 of Article 1 thereof above referred to.

Fourth. The court erred in not finding and adjudging that plaintiff in error in rebilling its oil car and barrel car from Columbia, Tennessee, to Mt. Pleasant, Tennessee, and making delivery of said oil and barrels at said town of Mt. Pleasant and collecting for the same, was engaged solely in interstate commerce and, therefore, not liable for said privilege tax to the State of Tennessee.

Fifth. The court erred in not finding and adjudging that plaintiff in error was engaged solely in interstate commerce and protected from the payment to the State of Tennessee of privilege tax under Chapter 479 of the Acts of Tennessee of 1909, by Section 8 of Article 1 of the Constitution of the United States, when it, *and* Indiana corporation, resident at Indianapolis, Indiana, and having no office or local agent in the State of Tennessee, nor any warehouse or storage house in the State of Tennessee, sent its traveling salesmen, who were residents of Indiana, into the State of Tennessee and there solicited and received written orders from citizens of Tennessee, addressed to it at Indianapolis, Indiana, and there received by it, and

in response to such orders so received, and in filling the same,
9 it shipped by railroad from Lawrenceville, Illinois, a tank car filled with oil and from Indianapolis, Indiana, a car filled with barrels to fill such orders so taken in Tennessee in Maury County, to Columbia, Tennessee, in said County, and after filling such orders from such citizens as were convenient to Columbia re-billed said cars by railroad to Mt. Pleasant, Tennessee, in said county, to fill such orders from such citizens as were convenient to Mt. Pleasant, Tennessee, a distance of 11.3 miles from Columbia, Tennessee. The reason this reshipment of said cars of oil and barrels was made from Columbia to Mt. Pleasant was because it was cheaper and more convenient to ship said cars to fill said orders in Maury County and re-bill same from Columbia to Mt. Pleasant than it was to make a direct shipment from said cities in Illinois and Indiana to Columbia and to Mt. Pleasant, and for the further reason that the railroad company receiving said shipment refused to allow plaintiff in error a 'stop-over' at Columbia with said cars with Mr. Pleasant as their final destination. Both of said cars, loaded with oil and barrels as aforesaid, were started on this interstate journey with the intention on the part of the plaintiff in error to fill said orders at both Columbia and Mt. Pleasant when said shipments were made. And said business and said transactions including said shipments, was commerce between the States of Tennessee and Indiana and Illinois and between the citizens of said respective States, and plaintiff was not, therefore, liable for said privilege tax to the State of Tennessee, and the State of Tennessee was inhibited under Section 8 of Article 1 of the Constitution of the United States from collecting or seeking to collect said tax off of plaintiff in error, and the collection of said tax was
and is a regulation of interstate commerce and of plaintiff
10 & 11 in error's said business, and is, therefore, a burden upon interstate commerce, and Chapter 479 of the Acts of Tennessee of 1909 in so far as the same imposes a tax upon plaintiff in error's said business is in violation of the Constitution and laws of the United States and especially in violation of Section 8 of Article 1 of the Constitution of the United States.

H. C. TRUE &
A. L. DORSEY,
Attorneys for Weston Oil Refining Co.

12 Supreme Court of Tennessee, December Term, 1914.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

The above entitled cause coming on to be heard upon the petition, assignments of error, bond, etc., of the appellant, the Western Oil Refining Company, for a writ of error from the Supreme Court of the State of Tennessee, and upon examination of said petition, and the examination of the record in said matter, and desiring

to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter;

It is ordered that a writ of error be, and is heregy allowed, to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and that the same is, hereby approved, and that it operate as a supersedeas in this cause.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

12*a* United States of America to A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, Successor in Office to H. W. Thomas, and to the Hon. Frank M. Thompson, Attorney General of the State of Tennessee, His Counsel:

You are hereby cited to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Tennessee, at Nashville, wherein the Western Oil Refining Company is complainant and A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, as the successor in office of H. W. Thomas, is defendant, to show cause, if any there be, why the judgment, or decree, rendered against the said Western Oil Refining Company, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the —— day of May, in the year of Our Lord, One Thousand, Nine Hundred and Fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

STATE OF TENNESSEE,
County of Madison, ss:

I, Frank M. Thompson, as Attorney-General for the State of Tennessee, acknowledge service of the foregoing citation upon me as such Attorney-General and, further, as the counsel for A. W. Lipscomb, Clerk of the County Court for Maury County, acknowledge the service of same for the said Lipscomb as such Clerk, the same being in the case of Western Oil Refining Company, complainant, vs. A. W. Lipscomb, as County Court Clerk of Maury County, Tennessee. The said dual service being acknowledged as aforesaid on this, the 26th day of May, 1915.

FRANK M. THOMPSON,
Attorney-General for Tennessee.
A. W. LIPSCOMB,
By FRANK M. THOMPSON,
Counsel for A. W. Lipscomb, County Court Clerk of Maury County.

12*b* United States of America to A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, successor in office to H. W. Thomas, and to the Hon. Frank M. Thompson, Attorney General of the State of Tennessee, his Counsel:

You are hereby cited to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Tennessee, at Nashville, wherein the Western Oil Refining Company is complainant and A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, as the successor in office of H. W. Thomas, is defendant, to show cause, if any there be, why the judgement, or decree, rendered against the said Western Oil Refining Company, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the —— day of May, in the Year of Our Lord, One Thousand, Nine Hundred and Fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

STATE OF TENNESSEE,
County of Madison, ss:

I, Frank M. Thompson, as Attorney-General for the State of Tennessee, acknowledge service of the foregoing citation upon me as such Attorney-General and, further, as the counsel for A. W. Lipscomb, Clerk of the County Court for Maury County, acknowledge the service of same for the said Lipscomb as such Clerk, the same being in the case of Western Oil Refining Company, complainant, vs. A. W. Lipscomb, as County Court Clerk of Maury County, Tennessee. The said dual service being acknowledged as aforesaid on this, the 26th day of May, 1915.

FRANK M. THOMPSON,
Attorney-General for Tennessee.
A. W. LIPSCOMB,
By FRANK M. THOMPSON,
Counsel for A. W. Lipscomb, County Court Clerk of Maury County.

13 STATE OF TENNESSEE:

Be it remembered that at a Supreme Court of Errors and Appeals begun and held at the Capitol in the City of Nashville on the First Monday in December, 1914, the same being the seventh day of December, 1914, neither Judge attending, I adjourned Court until tomorrow morning at 9:30 o'clock.

JOE J. ROACH, *Clerk.*

Neither Judge attending, I adjourned Court from day to day until December 14, 1914.

December 14, 1914.

Court met pursuant to adjournment, present and presiding the Honorable Associate Justice Grafton Green, and no other Judge attending he adjourned Court from day to day until December 21, 1914.

December 21, 1914.

Court met pursuant to adjournament, present the Honorable Chief Justice M. M. Neil and Associate Justice Grafton Green, and W. W. Faw by appointment of the Governor sitting during the disability of Judge D. L. Lansden, when the following proceedings were had and entered of record to wit:

April 17, 1915.

WESTERN OIL REFINING CO.
vs.
H. W. THOMAS, Clerk, &c.

In this cause upon motion of the appellee, Western Oil Refining Company, it is ordered by the court that the order made in this case, at this term of the Court on April 15, 1915, and entered on page 463 of Minute Book 29 be and the same is set aside and annulled.

14 STATE OF TENNESSEE:

Be it remembered that at a Supreme Court of Errors and Appeals begun and held at the Capitol in the City of Nashville on the First Monday in December, 1914, the same being the seventh day of December, 1914, neither Judge attending, I adjourned Court until tomorrow morning at 9:30 o'clock.

JOE J. ROACH, *Clerk.*

Neither Judge attending, I adjourned Court from day to day until December 14, 1914.

December 14, 1914.

Court met pursuant to adjournment, present and presiding the Honorable Associate Justice Grafton Green, and no other Judge attending he adjourned Court from day to day until December 21, 1914.

December 21, 1914.

Court met pursuant to adjournment, present the Honorable Chief Justice M. M. Neil and Associate Justice Grafton Green, and W. W. Faw by appointment of the Governor sitting during the disability of Judge D. L. Lansden, when the following proceedings were had and entered of record to wit:

April 17, 1915.

WESTERN OIL REFINING CO.
VS.
H. W. THOMAS, Clerk, &c.

Be it remembered that this cause was heard by the Honorable Judges of the Supreme Court of Tennessee, at Nashville, upon the transcript of the record from the circuit court of Maury County, Tennessee, assignments of error, and reply brief thereto, and argument of counsel, and the whole record in the case, and after due consideration thereof the court is of opinion that the appellants, G. W. Thomas, Clerk's assignments of errors, 1, 2, 3, 4, and 5 are well taken and that the circuit court of Maury County was in error in adjudging that the Western Oil Refining Company was entitled to recover off of the defendant the privilege tax paid by said Western Oil Refining Company to the said H. W. Thomas, Clerk, &c., under protest together with the costs incident to the collection of said privilege tax, all of which was sued for by said Western Oil Refining Co. in this case—this court being of opinion that the said Western Oil Refining Company was not in the selling and delivering of its oils and barrels as alleged by it in the pleadings in this cause and as shown by the agreed statement of facts engaged solely in Interstate Commerce, neither was its said business protected from taxation by the State of Tennessee, or by any county or city or town thereof by the constitution and laws of the United States of America, and particularly by Article 1, Section 8, paragraph 3, of said constitution, neither was said business of said Western Oil Refining Company protected from taxation by the State of Tennessee, or any of the counties, cities or towns of said State by Article 1, Section 10, of the Constitution of the United States of America, and the court is further of opinion that Section 4 of chapter 479 of the Acts of the General Assembly of the State of Tennessee of the year 1909, under which section of said Act the taxes and costs sued for in this case by the Western Oil Refining Company, were demanded and collected by the said H. W. Thomas, Clerk and after proper legal restraint paid by the Western Oil Refining Company, under protest is not unconstitutional and void and does not conflict with Article One, Section 8, paragraph 3, of the Constitution of the United States of America, or with Article 1, Section 10 of the Constitution of the United States of America.

It is therefore, ordered, adjudged and decreed by the court that this suit be and the same is dismissed, and that the appellee, Western Oil Refining Company pay all the costs of this cause and of this appeal, for which fi. fa. will issue. To all of which the Western Oil Refining Company excepted.

The opinion of the court is herewith filed and made a part of the record in this case.

Thereupon the appellee, the Western Oil Refining Company by and through its counsel gave notice in open court that it would apply to the Hon. Chief Justice of the Supreme Court of Tennessee

for a writ of error to this court from the Supreme Court of the United States to operate as a supersedeas and it is therefore ordered by the court that no execution will issue in this case unless the appellee, Western Oil Refining Co. shall fail to apply for and obtain said writ of error within thirty days from this date.

16 Filed June 4, 1915. Joe J. Roach, Clerk.

Maury. Law.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

PER CURIAM:

This was a suit by the Western Oil Refining Company to recover a privilege tax paid to H. W. Thomas, Clerk of the Maury County Court, under protest. There was a judgment in favor of the plaintiff below, from which the county clerk has appealed in error to this Court.

Save in one particular, to be noted hereafter, this case is similar to the case of Western Oil Refining Company vs. Lytle Dalton, Clerk of the Trousdale County Court, 130 Tenn., —, decided at a former day of the term.

In the case of Western Oil Refining Company vs. Dalton, supra, we concluded that the plaintiff was protected from the privilege tax sought to be imposed upon it by reason of the provisions of the Commerce clause of the Federal Constitution, as interpreted by the decisions of the United States Supreme Court referred to in the opinion therein.

This case seems to us distinguishable from the case of Western Oil Refining Company vs. Dalton, supra, for the reason that the tank car from which distribution was made at Mt. Pleasant came to Mt. Pleasant under a local or intrastate billing. The car was shipped from Indiana to Columbia, where part of its contents were distributed, and the car was then rebilled from there to Mt. Pleasant. Columbia and Mt. Pleasant are both towns within the State of Tennessee. We think that by reason of the manner in which this car was handled and the rebilling thereof at Columbia to Mt. Pleasant, the plaintiff below became liable for the tax imposed by Chapter 479 of the Acts of 1909, upon persons, firms, partnerships, corporations, etc., delivering or distributing oil from a railroad car. It was a distributor at Mt. Pleasant and the shipment came to Mt.
17–83 Pleasant under a local billing from another point within the State of Tennessee.

We are of opinion that the case of Gulf R. R. vs. Texas, 204 U. S., 412; 51 L. Ed., 546, justifies the distinction we have made.

The judgment of the circuit court will accordingly be reversed and plaintiff's suit dismissed.

* * * * * * *

84 Maury County.

Law. No.—.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

RECORD.

True & Dorsey, Springfield, Tenn.; J. Shelby Coffey, Columbia, Tenn., Attorneys for Plaintiff.
Horace Frierson, Jr., Attorney General, Attorney for Defendant.

Filed 30 day of Nov., 1914. Joe J. Roach, Clerk.

85 STATE OF TENNESSEE,
County of Maury:

Minute Book No. 7, Page 194, Civil Minutes, Circuit Court of Maury County, Tennessee, November 9, 1914.

Be it remembered that at a circuit court begun and held for Maury County at the Court House thereof in the City of Columbia, County of Maury, State of Tennessee, on the Second Monday in November, 1914, it being the 9th day of November, 1914, present and presiding the Honorable W. B. Turner, Judge of the Eleventh Judicial Circuit of Tennessee, the Hon. Horace Frierson, Jr., the regular Attorney General for said Court, —— ——, Clerk of said Court, and J. W. Griffin, Sheriff of Maury County: thereupon court was opened in due form of law by the said Sheriff, and the following proceedings were had and entered of record, to-wit:

Issued 11th day of June, 1914.

W. E. ALEXANDER,
Justice of the Peace.

WESTERN OIL REFINING CO.
vs.
H. W. THOMAS, County Court Clerk.

STATE OF TENNESSEE,
County of Maury:

Warrant.

To any lawful officer within said County:

You are hereby commanded to summon H. W. Thomas, County Court Clerk of Maury County, Tennessee to personally appear before me, or some other acting justice of the peace for said county, to

answer the complaint of the Western Oil Refining Company, a corporation chartered by and under the laws of the State of Indiana with its situs and place of business at Indianapolis, in said State of Indiana, by reason of the following facts, to-wit:

That heretofore, to-wit, on the — day of May, 1914, plaintiff Western Oil Refining Company, a corporation chartered
86 by and under the laws of the State of Indiana, with its home office and place of business in the city of Indianapolis, in said State of Indiana, and which corporation has not at any time had a warehouse, office, or place of business in Tennessee, shipped a railroad tank of oil from Lawrenceville, in the State of Illinois, and a car load of oil barrels from the city of Indianapolis, in the state of Indiana, to Columbia, in the county of Maury, in the State of Tennessee, for delivery to, and did deliver same to various customers of said company in response to written orders for the same, previously taken by the agent of said company from said customers in the State of Tennessee, and forwarded to and received by said company at Indianapolis, in the State of Indiana, before said shipments of oil and barrels were made, and plaintiff in so doing was engaged solely in interstate commerce; that on May 27, 1914, the defendant, H. W. Thomas, County Court Clerk as aforesaid, demanded of plaintiff that it pay to him a state license tax of Thirty Seven and 50/100 ($37.50) dollars before it should be permitted to deliver and collect for said oil and barrels shipped in response to said orders, which plaintiff refused to pay, it not being liable therefor; that thereupon, on May 29, 1914, the defendant, H. W. Thomas, County Court Clerk as aforesaid, issued a distress warrant to M. M. Butts, an acting Constable of said County, commanding him to distrain and sell so much of the goods and chattels of plaintiff as should be sufficient to pay said sum so demanded for said license, to-wit: $37.50, together with fees and costs of warrant, and to immediately execute and return the same to said Clerk by the 30th day of May, 1914, under penalty prescribed by law. And in pursuance of said distress warrant said Butts, constable, distrained upon and levied said warrant on 15 oil barrels, the property of plaintiff then located in car at Columbia, Tennessee, where-
87 upon, in order to prevent a sale of said property of plaintiff, the plaintiff on said date, to-wit, May 29th, 1914, paid said license fee of $37.50, together with the costs of said distress warrant, amounting to $4.50, all of which was paid under protest; and which sum and said license fees and costs the plaintiff did not and does not owe the State of Tennessee by reason of the fact that it, plaintiff, was in the safe and delivery of said oil and barrels engaged solely in interstate commerce, and therefore not liable for said license taxes. Wherefore plaintiff sues the defendants for said sum of $37.50 and said sum of $4.50 so illegally collected from it as aforesaid.

Under $500.00.

Give under my hand and seal this 11th day of June, 1914.

W. E. ALEXANDER,
Justice of the Peace.

Came to hand same day *is* issued and executed on the 11th day of June, 1914, by reading the within warrant to H. W. Thomas, County Court Clerk of Maury County, Tennessee, and citing him to appear for trial before W. E. Alexander, Justice of the Peace of Maury County, Tennessee, on the 19th day of June, 1914.

M. M. BUTTS, *Const.*

Continued to June 25, 1914.

STATE OF TENNESSEE,
Maury County:

To the Sheriff of Maury County, Tennessee:

Two suits are pending in the Justice of the Peace Court before W. E. Alexander, J. P. for Maury County, Tennessee, wherein the Western Oil Refining Company *are* plaintiffs and H. W. Thomas, County Court Clerk etc., is defendant in both suits.

It is suggested of record and admitted that the defendant, H. W. Thomas, is dead, and it is further suggested and admitted that
A. W. Lipscomb has been duly elected and has qualified as
88 the successor of the said H. W. Thomas, deceased, as County Court Clerk for Maury County, Tennessee.

You are therefore commanded to make these facts known to the said A. W. Lipscomb, County Court Clerk for Maury County, Tennessee, and that he may appear before the said W. E. Alexander, J. P. at his office in Columbia, Maury County, Tennessee, to show cause, if any he has, why the said suits should not be revived against him as successor of H. W. Thomas, County Court Clerk for Maury County, Tenn.

Witness my hand this the 9th day of September 1914.

W. E. ALEXANDER,
Justice of the Peace for Maury County, Tennessee.

Came to hand same day issued and I executed this summons by reading the same to A. W. Lipscomb, County Court Clerk for Maury County, Tenn., and citing him to appear before W. E. Alexander, J. P. at his office in Columbia, Maury County, Tenn., on Thursday, Sept. 10, 1914, at 10 o'Clock P. M. and show cause if any he has why said suits should not be revived against him as per said order. This Sept. 9, 1914. J. W. GRIFFIN, *S.*

Justice of the Peace Court.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, County Court Clerk, etc.,

In this cause it appearing, to the court from the return of the sheriff that A. W. Lipscomb has been served with notice to appear and show cause if any he has, why this suit should not be revived against him as the successor of H. W. Thomas, deceased, County

Court Clerk for Maury County, Tennessee, and the said A. W.
89 Lipscomb has not appeared in accordance with said writ, or shown any cause why said suits should not be revived against him.

It is therefore ordered and decreed that the said suits be revived in the name of A. W. Lipscomb, County Court Clerk &c, defendant instead of H. W. Thomas whom it is admitted is dead and that the said A. W. Lipscomb is his successor in office, and has duly qualified as such, and the said A. W. Lipscomb will hereafter be treated as defendant County Court Clerk etc., in both of said suits above named as same has been revived in his name.

W. E. ALEXANDER,
Justice of the Peace, Maury County, Tennessee.

Filed Sept. 10, 1914.

After hearing the proof and argument I give judgment against plaintiff and in favor of defendant for amount of taxes $37.50, and all costs of this cause, from which judgment plaintiff Western Oil Refining Company pray an appeal to Circuit Court for Maury County, Tennessee, which appeal is allowed and bond executed and filed this Sept. 10, 1914. W. E. ALEXANDER,

STATE OF TENNESSEE,
Maury County:

WESTERN OIL REFINING COMPANY.
vs.
A. W. LIPSCOMB, County Court Clerk, &c., et al.

Appeal Bond.

We, Western Oil Refining Co. (Incorporated) of Indianapolis, Indiana, principal, and Fidelity & Deposit Co. of Maryland, surety, acknowledge ourselves indebted to A. W. Lipscomb, County Court Clerk etc., et al. in the sum of Two Hundred and Fifty Dollars, to be void on condition that the said Western Oil Refining Co. who has this day appealed to the next term of the Circuit Court for Maury County from a judgment of W. E. Alexander, a Justice of the Peace of said County, in favor of A. W. Lipscomb, Clerk etc., et al. against said Western Oid Refining Company for thirty seven and 50/100 dollars shall prosecute said appeal successfully, or in case of failure — to do, shall pay and satisfy said judgment and the costs and damages that may be awarded against him by the court, shall comply with and perform the judgment of said Court.

This 10th day of September, 1914.

90 WESTERN OIL REFINING COMPANY,
By SHELBY COFFEY, *Att'y.*
FIDELITY & DEPOSIT CO. OF MARYLAND,
By J. H. DINNING, *Attorney in Fact.*
MORA B. FARRIS, *Agent.*

Approved.
W. E. ALEXANDER, *J. P.*

(The foregoing warrant is marked:) Filed Sept. 10, 1914, W. O. Witherspoon, D. C.

Minute Book No. 7, Page- 207-8-9, Civil Minutes.

Circuit Court of Maury County, Tennessee, November 14, 1914.

Court met pursuant to adjournment, present and presiding the Hon. W. B. Turner, Judge etc.

91 WESTERN OIL REFINING COMPANY
VS.
H. W. THOMAS, Clerk.

In this cause, upon motion, plaintiff is allowed by the court to — amend its warrant in this case as to allege in addition to what is already alleged in said warrant just before the words, "Therefore Plaintiff sues," etc., that said taxes were demanded and collected of plaintiff under the authority alleged to be conferred upon said Clerk by and under the last Revenue Acts of the General Assembly of the State of Tennessee, being Section 4, of Chapter 479, of the Acts of the General Assembly of the State of Tennessee, of the year 1909, which section, among other things, provides, as follows :

"Each and every person, firm, partnership, corporation, or local agent, having oil depots, storage tanks, or warehouses, for the purpose of selling, delivering or distributing oil of any description and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such puposes shall pay a privilege tax as follows," etc.

The plaintiff avers that in selling and delivering and collecting for its said products and merchandise as aforesaid it was engaged solely in interstate commerce and not liable for privilege tax for the conduct of its said business, either under said Act or otherwise, because its said business was protected from taxation by the State of Tennessee, or by any county, or city or town thereof, by the Constitution and laws of the United States of America, and particularly by Article 1, Section 8, paragraph 3, of said Constitution, which provides that the Congress shall have power to regulate commerce with foreign nations, and among the several states and among the Indian tribes, and also protected from such taxation by Article 1, Section 10, of the Constitution of the United States of
92 America, which, among other things, provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net yroduce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and c-ntrol of congress," all of which the plaintiff relies upon and pleads.

Plaintiff avers that said paragraph of section 4, of Chapter 479 of the Acts of the General Assembly of the State of Tennessee, do-not apply to the business of plaintiff, and that he was not liable for said privilege tax under said Section of said Act, but that if said Act and said Section thereof apply to plaintiff's said business then

that the same is unconstitutional and void in that the same is in conflict with said sections of the Constitutions of the United States hereinbefore referred to.

93 Filed 21 day of November, 1914. W. O. Witherspoon, D. C.

In the Circuit Court for Maury County, Tennessee, November Term, 1914.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Bill of Exceptions.

On the trial of this case the following proceedings were had to-wit:

The plaintiff read its warrant to the court and the amendment thereto which is entered on the Minutes of this court in this case.

The defendant pleaded not guilty thereto.

The parties hereto then read and submitted to the court the facts of this case, which are set out in the stipulation or agreed statement of facts filed herein on November 14, 1914, which agreed statement of facts *are* made a part of the record in this case and is in the words and figures as follows:

94 Filed Nov. 14, 1914. W. O. Witherspoon, Deputy Circuit Court Clerk.

Pending in the Circuit Court for Maury County, Tennessee.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Agreed Facts.

In the above entitled cause, pending in the Circuit Court for Maury County, Tennessee, on appeal from the judgment of the Justice of the Peace, it is stipulated and agreed that the following are facts:

That the Plaintiff, Western Oil Refining Co., is a corporation incorporated under the laws of the State of Indiana on March 26, 1911. Its capital stock is $15,000.00. It has no branch offices. It has no office or agency in the State of Tennessee, and never had. It does not now, nor has it ever, owned or leased any warehouses in any state other than the State of Indiana. It is a marketing, manufacturing and compounding company. It has a refinery at Lawrenceville, in the State of Illinois, where it refines crude petroleum into illuminating oil, gasoline and lubricating oils and greases, all of which it sells direct to the consumer. It also manufactures, in the

State of Indiana, steel barrels or tanks, to contain these oils, which it also sells direct to the consumer of the oils.

It markets its products through the medium of travelling salesmen, or solicitors. One of these travelling salesmen of plaintiff, whose residence was in the State of Indiana on or about the — day of May, 1914, went to Columbia, Maury County, Tennessee, to solicit business for plaintiff. His contract of employment by plaintiff (leaving names, dates and salary blank) is in the words and figures as follows:

95 Western Oil Refining Company, Indianapolis, Indiana.

Salesman Contract.

This agreement made and entered into by and between the Western Oil Refining, Company hereafter designated *and* company, and —— ——, of town of —— State of ——, hereinafter designated as salesman, severally agree as follows:

"The Western Oil Refining Company does by these presents hire and employ said —— —— and said —— —— hereby agree- to sell oils, greases and steel barrels marketed by company upon such terms and for such compensation as are hereinafter set forth.

"The salesman agreed that he will, while employed as salesman, devote his entire time and best endeavors to the sale of illuminating oil, steel barrels, lubricating oils and greases, marketed by the company, and that he will do no selling, advertising, or soliciting for any other person or firm, other than the company, and will only solicit business for the company in the territory which may from time to time be alloted to him and will only sell lubricating oils and greases at prices listed in the current price list of the company, and the illuminating oil, gasoline and steel barrels at such prices as directed by the company, and will also conform to whatever instructions he may receive from the company.

"The company agrees to pay salesman a salary of —— per day and half of said amount for half days while driving in the country soliciting for the company, and not to exceed one half day's salary while transferring from one town to another as directed by the company, his railroad fare in going from town where he was employed to town where he is to begin canvassing, and in the event of company terminating this contract his railroad fare from town
96 he is canvassing to town where he is employed, but if salesman quits the employ of the company, company is not to pay railroad fare from town where he quits; company also agrees to pay his railroad fare in going from one town to another as directed by the company, a reasonable amount for his board, livery hire and expenses, such as stamps, telephone, telegraph, etc., necessary for the transaction of the company's business, but the company is not to pay the railroad fare or salary of any salesman in going from or to his home or any other expenses not herein provided for.

"To assist salesman in his canvass, the company agrees to furnish

salesman with a sample case, instruction book, etc., the ownership of which is to remain in the company, and to insure the return of same in good condition, salesman agrees that the sum of three dollars may be deducted from his first week's salary, the amount so deducted to be paid to salesman when case and supplies are returned in good condition to the company.

"Should the company wish to use salesman as one of its travelling cashiers to make delivery of oils, etc., and receive payment therefor, salesman agrees that he will execute an indemnifying bond in the penal sum of one thousand dollars with some reliable surety company as surety to assure the company that he will account for all moneys of the company coming into his hands, and to secure such bond, will make and sign the necessary application to such surety company, the cost of securing such bond to be paid by the company.

"While making delivery for the company, salesman further agrees that he will, for and in behalf of the company receive shipment of oil, barrels, etc., and make delivery of same, but only on receipt of payment therefor, and cause all checks, and orders received by him in payment for said oils, barrels and other merchandise, to be made payable or endorsed to the Western Oil Refining Company
97 and that he will each day remit moneys, checks and orders, received by him in payment for oil, barrels and merchandise to the office of the company at Indianapolis, Indiana.

"Should the company desire salesman to assist in making a delivery of oils, the sale of which he has solicited the salesman agreed that he will upon notice go to the town at which delivery is being made, place his services at the disposal of the company's representative and use his best efforts in making delivery.

"While making or assisting in delivery, the company will pay salesman same salary as he would have received, were his time employed as salesman.

"It is further stipulated and agreed that the company and salesman shall at any time have the right to terminate this contract of employment, and upon termination thereof, salesman agrees that he will forward sample case, instruction book and supplies to office of company.

"Signed and executed in duplicate by the above named parties this — day of ——.

"WESTERN OIL REFINING COMPANY,

"By —— ——.

"—— ——. [SEAL.]"

And plaintiff's said salesman, about said date, solicited and took orders for plaintiff for oil, gasoline, and greases, refined and manufactured by plaintiff, and barrels manufactured by it, from farmers and other consumers in said County of Maury, which orders were in writing and addressed to plaintiff at Indianapolis, Indiana. These orders were signed by the purchaser and also by the salesman, and each order was taken on condition that a sufficient number of orders be procured to justify a shipment to Maury County, Tennessee, and the purchase was to be delivered to the

purchasers at Columbia, Tennessee, and Mount Pleasant,
98 Tennessee, in said county, where the same was to be paid for by the purchasers at the time of delivery of the goods to them. The purchasers were given the further privilege of examining the goods in order to ascertain if they were as represented. The purchaser was given a copy of the order, and the original orders were forwarded each night after each day's canvass by said salesman to the plaintiff at Indianapolis, Indiana. The said salesman of the plaintiff took a number of orders in said county of Maury and forwarded the same to plaintiff at Indianapolis, Indiana, until he had a sufficient amount to justify a shipment thereon.

One of said orders in blank form is in the words and figures as follows:

Western Oil Refining Company, Indianapolis, Indiana.

Order No. —. Date —— —, ——.
Sold to John Doe.
Ship to ——, Tennessee.
Postoffice ——, Tennessee.
How ship ——. When ——.
Terms, C. O. D. Tel. No. ——.

50 Gal. Kerosine	$6.50
1 Steel Barrel	5.50
	12.00

Purchaser —— ——."
Salesman —— ——."

All of said orders so taken for plaintiff by said salesman were forwarded by him from Columbia, and Mount Pleasant, Tennessee, to plaintiff at Indianapolis, Indiana, and there received by plaintiff, and after said orders had been received by plaintiff at Indianapolis, Indiana, it did, in response to said orders and in filling same, ship a car of oil in a railroad oil tank from Lawrenceville, Illinois, and a car of steel barrels from Indianapolis, Indiana, to itself at
99 said town of Columbia, Maury County, Tennessee, to fill said orders so taken by the said salesman. In some instances, however, the purchaser had their own oil barrels, and only ordered oil without the steel barrels.

And upon the arrival of said car of oil and said car of steel barrels at Columbia, Maury County, Tennessee, by railroad, the agent of the railroad company at Columbia, Tennessee, notified plaintiff by telegraph, that said cars had arrived at said town of Columbia, whereupon plaintiff, by the United States mail, from Indianapolis, Indiana, notified said purchasers of said oil and said steel barrels of the arrival of same at Columbia, Maury County, Tennessee, and thereupon sent one of its traveling cashiers to said town of Columbia, Tennessee, to make delivery of said oil and said barrels to said persons who had given said orders for the same. And said cashier,

E. C. Walker, a citizen of Indianapolis, Indiana, so sent by plaintiff from the State of Indiana to make delivery of said oils and barrels to said customers of plaintiff at Columbia, Tennessee, arrived at said town of Columbia and began to make delivery of said oils and gasoline and greases and said barrels to said customers who had previously given said orders to the solicitor of plaintiff who had in turn sent them to plaintiff, at Indianapolis, Indiana, before said cars of oil and barrels were shipped from Illinois and Indiana to said town of Columbia, Tennessee, and in making delivery to said persons who had given said orders he delivered to each customer the amount of oil, gasoline, or grease his said respective order called for, and no more, and to each the number of barrels his said respective order called for and no more, nor did any person receive from plaintiff any oil or barrels or any other article that had not been ordered as aforesaid.

And its method of delivery of said oil and said barrels at
100 said town of Columbia, Tennessee, was by drawing the number of gallons so ordered by the customer out of said railroad tank car into the steel barrels that had also been ordered as aforesaid, or by drawing out of said railroad tank car the number of gallons of oil so ordered by the customer into the customer's own barrel and delivering the same to said customer and then and there receiving payment therefor at the price agreed upon when said order was taken, without said oils or barrels having ever been removed from the railroad track or from said cars in which they arrived at said town of Columbia, Tennessee, or stored in any place or warehouse or mixed or mingled with any other property.

And plaintiff's said cashier was making collections for said oils and barrels so delivered to said customer and remitting same in full to plaintiff at Indianapolis, Indiana, each night, after each day's business, and his salary, or wages, and expenses were paid him each month by check sent to him from plaintiff at Indianapolis, Indiana, and he did not receive any part of the proceeds of the said particular car of oil and barrels so shipped to said town of Columbia, Tennessee, when on May 29, A. D. 1914, H. W. Thomas, County Court Clerk of said Maury County, Tennessee, demanded of plaintiff that it pay him a privilege license tax for the State of Tennessee, for exercising said business, which plaintiff refused to do, claiming that in taking said orders and making said sales and deliveries it was engaged in interstate commerce. Whereupon, on the 29th day of May, 1914, said H. W. Thomas, County Court Clerk, as aforesaid, issued a distress warrant against the property of plaintiff to collect said taxes, which, on said date, came to the hands of M. M. Butts, a constable of said County of Maury, who upon the same date levied said warrant upon and distrained upon oil barrels, the property of
101 plaintiff, in the car on the Louisville & Nashville Railroad track at said town of Columbia, Tennessee, in order to collect said taxes so demanded of plaintiff by said County Court Clerk and would have sold same, but plaintiff, after the levy of said distress warrant and said distraint, in order that its property might not be sold under said distress warrant, paid said taxes so demanded of it

by said County Court Clerk, paying the same to said Clerk under protest on said date, to-wit, May 29, 1914.

Said distress warrant, together with the said Constable's return thereon, are in the words and figures as follows:

STATE OF TENNESSEE,
Maury County:

To the Sheriff of any Constable of Maury County, State of Tennessee, Greeting:

Whereas, Western Oil Refining Company has been and is now exercising the privilege of selling or delivering oil in said county, without having first obtained a license therefor:

Now, therefore, you are hereby commanded to distrain and sell so much of the goods and chattels of said Western Oil Refining Company as shall be sufficient to pay Seventy Five Dallors, being the tax imposed by law in such cases made and provided, together with the fees and costs of the warrant and to immediately execute and return the same to me, by the 30th day of May, 1914, under the penalty prescribed by law. Herein fail not.

Witness my hand at office this 29th day of May, 1914.

(Signed) H. W. THOMAS, *Clerk,"*
"Per A. L. THOMAS."

102 [Endorsed:] Distress Warrant vs. Western Oil Refining Company. Issued May 29, 1914. H. W. Thomas, Clerk," "per A. L. Thomas."

Came to hand same day issued and on same day I levied on fifteen oil barrels as the property of the Western Oil Refining Company, for the purpose of satisfying this warrant, and on same day before advertisement for sale I returned the within warrant without sale by order of the County Court Clerk of Maury County, Tennessee, the amount distrained for and the costs having been paid to said County Court Clerk after levy."

This May 29, 1914.

(Signed) M. M. BUTTS,
Constable for Maury County, Tenn."

Plaintiff was also compelled to pay the costs of the issuance of said distress warrant and the levy of the same.

The amount of said taxes so paid the said County Court Clerk for the State of Tennessee was $37.50, and said Clerk's costs for issuing and said officer's cost for making levy were $2.50, and said circuit court clerk's fees were $1.50, all amounting to $42.50, which plaintiff was compelled to pay said county court clerk for the state of Tennessee as said license fee and the costs of said Clerks and said constable in order that its said property so distrained upon might not be sold.

And thereupon said County Court Clerk issued to plaintiff a privilege license, which is in the words and figures as follows:

"Original."

103 *Privilege License.*

STATE OF TENNESSEE,
Maury County:

Paid under protest.

H. W. THOMAS, *Clerk,*
By A. L. THOMAS.

No. 202.

Whereas, Western Oil Refining Company, has this day applied to the Clerk of the County Court of Maury for a license to *selling* oil from car in said county, at city, and paid to the said clerk the sum of $37.50, *dollars,* the state tax, and $37.50, *dollars,* the county tax on said privilege:

These are, therefore, to license you, the said Western Oil Refining Company, to exercise said privilege at any place in said county for the term of three months from the 27th day of May, 1914.

State Tax.....	$37.50
County tax.....	37.50
Clerk's fee.....	1.00
Circuit Court.....	.50
Total	$76.50

H. W. THOMAS, *Clerk,*
Per A. L. THOMAS.

In order for plaintiff to secure a sufficient number of orders to make up a full tank car shipment of oil in said county of Maury it was necessary for it to go further than the territory served by said railroad from said town of Columbia and it went into the vicinity of said town of Mount Pleasant, which is 11.3 miles from said town of Columbia, and plaintiff's reason for not billing cars to said town of Mount Pleasant from Indiana and Illinois, with stop-over allowed at Columbia, which is on the route from said points in Indiana and Illinois, was because the railroad companies receiving said shipment would not allow such stopover privilege, though the same is allowed on nearly every other kind
104 of shipment, and after having completed its deliveries, as aforesaid, to said farmers and customers in said county of Maury who were most convenient to said town of Columbia, said car, containing the remainder of the oil and said car containing the remainder of said barrels were re-billed, or re-shipped, from said town of Columbia in said county, to said town of Mount

Pleasant, in said county, where the remainder of said orders so taken in said county of Maury were fil-ed from said cars, and collection made therefor in the same manner that said deliveries and collections were made at said town of Columbia, Tennessee.

By filling the aforementioned orders by shipping said oil in a tank car the freight rate from the said beginning points to Columbia, Tennessee, was approximately one half cent on the gallon cheaper than if said oil had been placed in barrels at Lawrenceville, Illinois, and shipped directly to and consigned directly to said consumer. In many cases the customer had his own barrel and it would have been impossible to have sold him oil without selling him a barrel unless he had have sent his barrel to the refinery to be filled and re-shipped to him or unless plaintiff had have furnished him a barrel and then had such barrel re-shipped to it. The delivery of said oils by plaintiff to its said custome-s in filling said orders was cheaper and more convenient by railroad tank cars than by consigning same in a barrel direct to the consumer from Lawrenceville, Illinois.

The said tank car containing the oil so shipped by plaintiff to Columbia, Tennessee, arrived five or six days before the car containing the barrels arrived at said town of Columbia. The delivery of the oil was delayed awaiting the arrival of the said car containing the barrels. After the delivery was begun to said customers of plaintiff it was completed in eight days. Demurrage, or charges for cars standing on the tracks unloaded for more than forty-eight hours, was paid by plaintiff to the Railroad Company, the amount of said demurrage on said oil car was $17.00 and on said barrel car was $11.00. Four days is the usual time for the completion of deliveries by the plaintiff, but in this instance, the consumation of eight days in making the delivery was occasioned by the failure of those who had given orders to plaintiff for said oil and barrels to come promptly and receive the same. No demurrage was paid by plaintiff at said town of Mount Pleasant.

The authority under which said clerk demanded of and collected from plaintiff said privilege tax was Section 4, of Chapter 479 of the Acts of the General Assembly of the State of Tennessee, of 1909, which section, among other things, provides, as follows:

"Each and every person, firm, partnership, corporation, or local agent, having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purpose, shall pay a privilege tax as follows," etc.

Plaintiff brought this suit for the recovery of such taxes and costs so paid by it under protest within thirty days after the payment thereof as aforesaid.

It is agreed that the foregoing are the facts of this case and that this paper containing such facts shall be filed in the circuit court of Maury County, Tennessee, and that the facts herein agreed to

shall be submitted to that court for the determination of the question whether said plaintiff is liable for said tax and costs.

WESTERN OIL REFINING CO.,
By A. L. DORSEY, *Attorney.*
A. W. LIPSCOMB,
County Court Clerk of Maury County, Tennessee.
HORACE FRIERSON, JR.,
Att'y-Gen., Attorney for Defendant.

106 STATE OF TENNESSEE,
County of Maury:

I, A. L. Dorsey, of Springfield, Robertson County, Tennessee, Attorney for the plaintiff, Western Oil Refining Company, do solemnly swear that the controversy mentioned and set forth in the above paper is real; and that this proceeding is in good faith to determine the rights of the parties in the premises.

A. L. DORSEY.

Sworn to and subscribed before me, this the 14th day of November, A. D. 1914.

W. O. WITHERSPOON,
Deputy Circuit Court Cl'k.

STATE OF TENNESSEE,
County of Maury:

I. A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, do solemnly swear that the controversy mentioned and set forth in the above paper is real; and that this proceeding is in good faith to determine the rights of the parties in the premises.

A. W. LIPSCOMB.

Sworn to and subscribed before me, this the 14th day of Nov. A. D. 1914.

W. O. WITHERSPOON,
Deputy Circuit Court Clerk.

This was the evidence in the case.

And after argument of counsel, the defendant being represented by Horace Frierson, Jr., Attorney-General for the State, and due consideration of the same together with the whole record in this case the court was pleased to and did render judgment in favor of the plaintiff and against the defendants, which judgment appears on the minutes of the court in this case, to which the defendant excepted.

107 Defendant then moved the court to grant him a new trial, which motion was reduced to writing and spread upon the minutes of the court, and after argument of counsel and due consideration of said motion the court was pleased to and did overrule said motion for a new trial, to all of which the defendant ex-

cepted and prayed and appeal to the next term of the Supreme Court of Tennessee at Nashville, which is granted, and for good cause shown to the court the defendant was by the court allowed ten days within which to perfect said appeal and file his bill of exceptions. And it appearing to the court that this case, is, in real-ty, a suit against the State of Tennessee, the defendant was therefore allowed to appeal without giving bond.

The court rendered a written opinion in this case, which is filed herein and made a part of the record in this case and a part of this bill of exceptions, and will be copied into the bill of exceptions.

Said opinion is in the words and figures as follows:

Filed Nov. 21, 1914.

In the Circuit Court of Maury County.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Opinion.

A fair construction of the agreed facts in this case shows:

1. That the plaintiff, the Western Oil Refining Company is a non-resident corporation.

2. That its place of business is at Indianapolis, Indiana.

3. That it has no offices or agencies in the State of Tennessee, and never has had.

4. This company sent its agents or salesmen into Maury County, Tennessee, who took orders for oil and oil-tanks, which were at the time of the taking of the orders in other states.

108 5. These orders were sent to the plaintiff by its agents to its place of business outside the state, and a shipment of goods covering the orders was prepared and sent by railroad transportation into the State of Tennessee.

6. An agent of the plaintiff came to Tennessee and delivered the goods sold to the persons who had ordered the same, such deliveries being made from the cars in which they were shipped.

These are the main facts attending the transaction which brought about the litigation. However, there are other material facts set out in the agreed facts on file in this case.

There can be no doubt but the shipment was an interstate transaction unless there was something in the method of delivery which changes its nature and made it subject to local laws, thereby rendering the plaintiff liable for the privil-ge tax involved in this controversy.

It is contended that chapter 479 of the Acts of 1909, page 1726, authorize the collection of the privilege tax involved in this suit. The clause of the Act relied upon is as follows:

"Each and every person, firm, partnership, corporation or local

agent, having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purpose shall pay a privilege tax as follows:"

Passing for the present the contention on the part of plaintiff that this act does not cover the transaction set out in the "Agreed Facts," and considering it as though it did then, it must be determined whether or not the Act is valid in so far as it covers this transaction.

In Article 1, Section 8, Clause 3, of the Constitution of the United States, Congress is given power to regulate commerce
109 among the States, and in Clause 10 of the same Article and Section, the several states are denied that right.

In regard to some questions the State can enact laws which would be valid and binding, so long as Congress does not act in the same field under the power granted it under the Constitution. However, in regard to other questions, for example, the regulation of Interstate Commerce, the State has no power to act at all, and there can be no regulation until Congress itself acts.

This distinction is made clear in the case of Palmer vs. Express Company, 129 Tenn., 141, and in the Minnesota Rate Cases, 57 Law Ed. U. S. 1511, and in Leisy v. Hardin, 34 Law Ed. U. S. 128; Robbins vs. Taxing District, 30 Law Ed. U. S. 694.

With this principle in mind, it is only necessary to determine the rights of the plaintiff in the management of its business under the constitution construed by the Supreme Court of the United States.

The law applicable to the case at bar is more readily understood if we keep clearly in mind the distinction between the right to transport goods from one state to another and deliver them in any form and by any means, and the right to import goods from one state to another and sell them in the original package after importation into the state.

Brown vs. Maryland, 6 Law Ed. U. S. 684;
Hurford vs. State, 7 Pickle 672.

Merchandise sold outside the State to residents of this state may be shipped to this state and delivered, without being subject to state regulation or tax. The means of transportation and method of delivery are not material.

Brown vs. Maryland, 6 Law Ed. U. S. 684.

A person has a right to import or to bring into this state merchandise from another state, and to sell the same, in this
110 State, after arrival, in the original package without being subject to state regulation and tax.

Leisy v. Hardin, 34 Law Ed. U. S. 128;
Austin v. Tenn., 45 Law Ed. U. S. 224.

A *demurrer* or an agent of a non-resident corporation or principal has a right to take orders in this State for merchandise, and

the non-resident principal has the right to deliver in this state the goods so ordered without being liable to state tax.

Robbins vs. Taxing District, 30 Law Ed. U. S. 694.

In the case of Caldwell vs. North Carolina orders had been originally taken for enlarging pic*ut*-es. The defendant, Caldwell, was engaged in delivering the same and frames therefor, which had been shipped separately, when he was arrested for a failure to pay a privilege tax. . It was held he was not liable for the tax.

Brennen v. Titusville, 38 Law Ed. U. S. 719, is the same cha-acter of case and resulted the same way. In the case of Crenshaw v. Arkansas, 57 Law Ed. U. S. 565, agents sold ranges by sample in Arkansas, which were shipped in car load lots without any identifying marks and delivered. It was held that the seller was not liable for the taxes.

In the case of Rogers vs. Arkansas, 57 Law Ed. U. S. 567, buggies were sold in the same way and shipped tagged in car load lots and delivered according to the tag.

It was held in this case that the same principle governed as in Crenshaw case, and it was immaterial whether the articles were marked for the specific purchaser or not.

The late Tennessee cases are in accord with the above holdings of the U. S. Supreme Court.

The facts in Hurford vs. State, 7 Pickle 672, are that Hurford, a non-resident, was the agent of the Novelty Cuttlery Company, a resident of Canton, Ohio. Hurford sold knives by sample in Tennessee, the goods at the time of the sale being in Ohio, the
111 orders were sent to the home office at Canton, the goods shipped to Tennessee and delivered. In this case the court said:

"If the order is sent out of the state and the goods afterwards sent into the State to fill it, it is immaterial whether delivery to the buyer is to be by carrier, a postman, or by an agent of the seller, to whom they are sent for delivery in pursuance of a sale previously negotiated while the goods were outside the State."

The case of Austin v. State, 17 Pickle 564, 45 Law Ed. U. S. 224, is a case where a resident of Tennessee purchased a basket of ordinary packages of cigarettes, put loose and uncovered into the basket, from the American Tobacco Company of New Jersey, and they were shipped into the State by express in this open basket. This resident merchant, Austin, then sold these small packages of ten cigarettes to his trade. He hoped to escape punishment under the theory that he was selling in the original package. The Supreme Court of the United States held that the basket was the original package and not the small ten-cent package, and that, therefore, the defendant, Austin, could not escape the penalty.

This is an entirely different case from the one at bar. Austin did not have an order for any of the goods before they were shipped. He sold them as his own. If he had sold them in the original shipping package he would not have been liable. In the case at bar the Western Oil Company denies liability upon the ground that

the goods were sold while out of the State and that they had a right to deliver them by the most practical means; not to sell them.

The case of Kimmel v. State, 20 Pickle 184, is different in all of its material points from the one at bar. In the Kimmel case the court finds that Kimmel was not acting as agent but was selling the goods as his own, and the proceedings were against
112 the agent himself, but in the case at bar it is not contended that the salesmen taking the orders and making the deliveries were acting on their own account. It is admitted by the very nature of the proceedings that they were agents and that the transactions were those of their principal by the fact that the whole proceedings in this case is against the Western Oil Refining Company. In the first part of the opinion it is said that if Kimmel had been acting as the agent of the company it would be a clear case of interstate commerce and this is said notwithstanding the fact that the facts show that the goods were opened and the contents of the packages distributed among several purchasers. When Kimmel received the goods as his own, as found by the court, *and* he had a right to sell them on his own account in the original package without liability, but he broke the original package and disposed of the goods, thereby taking it out of the field of interstate commerce and rendering himself personally liable.

It will be noticed also, that in all the cases, viz: the Scott case, 14 Pickle 254, and Hurford case, where the salesman was found to be the agent of the non-resident principal, the Supreme Court has held the parties to be engaged in interstate commerce and not subject to local regulations. In the Kimmel case the same thing is held but Kimmel was convicted because he bought the goods on his own account and not as agent, and sold them as his own.

The foregoing principles are well sustained in the case of Palmer vs. Express Co., 129 Tenn., 124, where it is said delivery is an essential part of interstate commerce in any article transported from one state to another in course of that commerce, and cannot be interfered with by the State, and, "The continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment and the accomplishment
113 thereof delivery covered by the contract is protected by the Constitution of the United States;" and, also, "That until such delivery to the consignee, such commodities do not become subject to a state regulation restraining their sale or disposition."

Congress has not limited the means of transportation nor the method of delivery, and the State has no right to do so, but Congress has recognized pipe lines, cars and other facilities of transportation. It is admitted in the case at bar that when the oil and barrels left the business place of the non-resident shipper that it was sent on its way by the most practical means to the purchasers. There is no contention that there was any alteration of the destination or any subterfuge practiced.

We find no authority for saying that each person's goods must be packed in separate packages, or that separate articles shipped to the same party might not be put together or united and delivered

together. We find no authority that holds that the shipper can not use the most practical means of transporting his commodities.

As to the reshipment from Columbia to Mt. Pleasant, it is apparent that the shipper started the goods with the intent and purpose that their ultimate destination should be Mt. Pleasant and the purchasers there. So long as that purpose was in view no reason can be given why the shipper can not take advantage of any number of transportation companies or reshipments. The framers of the constitution knew nothing of the immense transportation systems now existing, but must have contemplated that goods would be shipped in many ways and by broken journeys. The change from one transportation company to another or reshipping over the same lines does not break the continuity of the shipment.

114 Terminal Co. v. Inter. C. C. 55 Law Ed. U. S. 320.

Many decisions might be cited to sustain this position. The cases which are in apparent conflict will upon investigation, be found to contain material differences in regard to the facts.

Under this view of the case at bar the plaintiff is entitled to recover the amount of taxes heretofore paid, and judgment will be entered in its favor accordingly. It will not be necessary to consider the other questions involved.

W. B. TURNER, *Judge.*

Thereupon, the defendant tenders this his bill of exceptions to the action of the court in rendering judgment in this case against him in favor of the plaintiff and to the action of the court in refusing to grant him a new trial of this cause, which is signed, filed and made a part of the record in the case.

This November 21st, 1914.

W. B. TURNER,
Circuit Judge.

115 Civil Minute Book No. 7, Page 208, Civil Minutes.

Circuit Court, Maury County, Tennessee, November 21, 1914.

Court met pursuant to adjournament, present and presiding the Hon. W. B. Turner, Judge, etc.

No. 1, N. J., 499.

WESTERN OIL REFINING CO.
vs.
H. W. THOMAS, Clerk.

In this cause it appears to the court that this suit was originally brought against H. W. Thomas, County Court Clerk of Maury County, Tennessee, before a justice of the Peace, for said county, to recover taxes paid under protest by the plaintiff to said Thomas,

as such clerk, for the State of Tennessee, and that pending said trial of this case before said Justice of the Peace that the said H. W. Thomas died, and A. W. Lipscomb was elected as his successor as such County Court Clerk of said County, and that this cause was regularly and legally revived against the said A. W. Lipscomb as County Court Clerk of said County before said Justice of the Peace.

And this cause was this day heard before the Hon. W. Bruce Turner, Judge, etc., upon the agreed facts in this case, filed herein on Nov. 14, 1914, and whole record in the case, and after argument of counsel and upon due consideration of all of which the court is of opinion and doth so hold and adjudge that the plaintiff, Western Oil Refining Company, was engaged in interstate commerce in making the sales and deliveries of its products in Maury County, Tenn., as set forth in said agreement or stipulation of facts, and that it is not and was not liable to the State of Tennessee for said privilege tax demanded and collected of it by the said H. W. Thomas, Clerk as aforesaid, and the plaintiff having paid tax under protest after distraint had been made upon its property and having
116 regularly brought its suit for the recovery thereof within the time prescribed by law; it is therefore ordered and adjudged by the court that plaintiff, Western Oil Refining Company, have and recover of the said A. W. Lipscomb, County Court Clerk of Maury County, Tennessee, said tax and costs so paid under protest, amounting to forty-two and 50/100 ($42.50) dollars, and all costs of this cause, and that said taxes be refunded to it by the State of Tennessee, and that the same together with the costs of this cause be certified for payment to the Comptroller of the State of Tennessee. To all of which defendant excepted.

117 Civil Minute Book No. 7, Page 209, Civil Minutes.

Circuit Court of Maury County, Tennessee, November 9, 1914.

No. 1.

WESTERN OIL REFINING COMPANY
vs.
H. W. THOMAS, Clerk.

Motion for a New Trial.

In this case the defendant moves the court for a new trial of this case, and assigns the following grounds, therefor, to-wit:

I.

There is no evidence to sustain the findings and judgment of the court.

II.

Because under the laws of the State of Tennessee the plaintiff was liable for said privilege license tax.

III.

Because even if the original transactions and shipments were interstate commerce the character of the transaction changed from an interstate one to one of intrastate commerce when said cars were rebilled to Mt. Pleasant, Tennessee, from Columbia, and deliveries there made.

IV.

Because when said oils were put in said barrels and then delivered to the purchaser, all in Tennessee, the transaction lost its character as interstate commerce and plaintiff thereupon became liable for said privilege tax.

And after due consideration of said motion for a new trial the court is pleased to and doth overrule the same, to which defendant excepted, and prayed an appeal to the next term of the Supreme Court of Tennessee, at Nashville, which is granted, and for good cause shown to the court the defendant is allowed ten days within
118 which to perfect his appeal and file his bill of exceptions.

And it appearing to the court that this is, in reality, a case against the State of Tennessee, the court is therefore pleased to grant said appeal without bond.

119 *Bill of Costs.*

WESTERN OIL REFINING CO.
vs.
H. W. THOMAS, Clerk.

State Tax	$2.50	
County Tax	2.50	
		$5.00
W. E. Alexander, J. P.:		
Warrant .25, judgment .75, docketing .15, Cont. .10	$1.25	
Spa. .25, Notice .50, Bond .50, Bill of Cost .25	1.50	
M. M. Butts, C. M. C. Writ	.50	
J. W. Griffin, Sheriff, Notice	.50	
S. A. Hayes, Clerk:		
Filing papers .75, 3 Dkts. 30, Motion to Amend .25	1.30	
Order Granting .25, Filing same .25, Filing opinion .25	.75	
Order set .25, Judgment .75, judgment cost .25	1.25	
Ex. Dokt. .50, Motion new trial .25, order overrule .25	1.00	

Motion appeal .25, Order granting .50, filing bill Ex. .25	1.00	
Transcript 11,100 words	11.10	
Certificate and seal	.50	
Postage	.25	
		20.90
		25.90
This transcript 36,300 words		36.30
		$62.20

120 *Certificate.*

STATE OF TENNESSEE,
Maury County:

I, S. A. Hays, Circuit Court Clerk for the County, and State, aforesaid, do hereby certify that the foregoing is a true and perfect copy and transcript of the record in the case of Western Oil Refining Co. vs. H. W. Thomas, Clerk, No. 1, as appears of record and on file in my office.

And I further certify that the Bill of Costs hereto attached is properly taxed as appears of record and on file in my office.

Given under my hand and seal of office at Columbia, Tennessee, this the 28 day of November, 1914.

[SEAL.]

S. A. HAYS, *Clerk.*

121 STATE OF TENNESSEE:

I, Joe J. Roach, Clerk of the Supreme Court for the Middle Division of Tennessee, in obedience to the commands of the within writ, herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause with all things concerning the same.

Witness my hand and the seal of the Supreme Court of the State of Tennessee, this the 9th day of June, 1915.

[Seal Supreme Court, Nashville.]

JOE J. ROACH,
Supreme Court Clerk.

122 In the Supreme Court of the United States of America, October Term, 1915.

No. 517.

WESTERN OIL REFINING COMPANY
vs.
A. W. LIPSCOMB, Clerk.

Stipulation or Agreement as to Printing Record.

To the Hon. James D. Maher, Clerk:

In the above entitled cause it is agreed by the parties thereto, through their counsel, that the Clerk of the Supreme Court of the United States in printing the record will omit therefrom and not print the briefs filed by counsel for the respective parties in the Supreme Court of Tennessee, which seem to appear in the record as transmitted from the Clerk of the Supreme Court of Tennessee, at pages 18, 19, 26, 27, 29, 31, 40, 41, 49, and said Clerk is respectively directed accordingly.

This the 17th day of July, 1916.

HENRY CLAY TRUE,
Attorney for Plaintiff, Western Oil Refining Company.
FRANK M. THOMPSON,
Attorney General for State of Tennessee and Attorney for Defendant in Error.

E. C.

123 [Endorsed:] File No. 24800. Supreme Court U. S., October Term, 1916. Term No. 168. Western Oil Refining Co., Pl'ff in Error, vs. A. W. Lipscomb, Clerk of Maury County Court, etc. Stipulation to omit briefs in printing. Filed July 19, 1916.

Endorsed on cover: File No. 24,800. Tennessee Supreme Court. Term No. 168. Western Oil Refining Company, plaintiff in error, vs. A. W. Lipscomb, clerk of the County Court of Maury County, State of Tennessee, as successor in office of H. W. Thomas, deceased. Filed June 16th, 1915. File No. 24,800.

Office Supreme Court, U. S.
FILED
AUG 23 1915
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1915

No. 168

WESTERN OIL REFINING COMPANY
Plaintiff in Error

vs.

A. W. LIPSCOMB, CLERK OF THE COUNTY COURT OF MAURY COUNTY, STATE OF TENNESSEE, AS SUCCESSOR IN OFFICE OF H. W. THOMAS, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

H. C. TRUE,
A. L. DORSEY,
Attorneys for Plaintiff in Error.

NASHVILLE, TENN.
McQUIDDY PRINTING CO.
1915

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In the Supreme Court of the United States

OCTOBER TERM, 1915. No. 168.

Western Oil Refining Company, Plaintiff in Error,

vs.

A. W. Lipscomb, Clerk of the County Court of Maury County, State of Tennessee, as Successor in Office of H. W. Thomas, Deceased.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, an Indiana oil company, insists that it was doing an interstate business in selling and delivering its products in Tennessee, and that the State of Tennessee had no right to collect a privilege tax from it, because such tax was a burden upon interstate commerce, and, therefore, in violation of the commerce clause of the Federal Constitution.

The direct and only question here is whether a rebilling of two cars in plaintiff in error's products from Columbia, Tennessee, to Mount Pleasant, Tennessee, a distance of 11.3 miles, in Maury County, Tennessee, was interstate or intrastate commerce. (Printed Record, pages 10, 11.)

This suit was commenced by plaintiff in error against H. W.

Thomas, County Court Clerk of Maury County, Tennessee, before a Justice of the Peace for said county, to recover of said Clerk a privilege tax demanded by said Clerk for the State of Tennessee of plaintiff in error for doing business in Tennessee, and paid by plaintiff in error under protest after said Clerk had issued a distress warrant against plaintiff in error's property and the same had been levied upon plaintiff in error's property. Said Justice of the Peace having decided the suit against plaintiff in error, thereupon an appeal was taken by plaintiff in error to the Circuit Court of Maury County, Tennessee; and in said Circuit Court judgment was rendered in favor of plaintiff in error for the amount of said privilege tax so paid by it under protest; whereupon said County Court Clerk appealed from the judgment of said Circuit Court to the Supreme Court of Tennessee, the highest court of said State in which a decision in this suit and matter could be had, where the judgment of said Circuit Court was reversed and plaintiff in error's suit dismissed. A writ of error was allowed from this Court to that. (Printed Record, page 6.)

The facts in this case were agreed to, and are as follows:

That the plaintiff, Western Oil Refining Company, is a corporation incorporated under the laws of the State of Indiana on March 26, 1911. Its capital stock is $15,000.00. It has no branch offices. It has no office or agency in the State of Tennessee, and never had. It does not now, nor has it ever, owned or leased any warehouses in any State other than the State of Indiana. It is a marketing, manufacturing, and compounding company. It has a refinery at Lawrenceville, in the State of Illinois, where it refines crude petroleum into illuminating oil, gasoline and lubricating oils and greases, all of which it sells direct to the consumer. It also manufactures, in the State of Indiana, steel barrels or tanks to contain these oils, which it also sells direct to the consumer of the oils.

It markets its products through the medium of traveling salesmen, or solicitors. One of these traveling salesmen of plaintiff, whose residence was in the State of Indiana, on or about the ———— day of May, 1914, went to Columbia, Maury County, Tennessee, to solicit business for plaintiff. His contract of em-

ployment by plaintiff (leaving names, dates and salaries blank) is in the words and figures as follows:

"WESTERN OIL REFINING COMPANY, INDIANAPOLIS, INDIANA.

"*Salesman Contract.*

"This agreement made and entered into by and between the Western Oil Refining Company, hereinafter designated as 'Company,' and_____, of the town of _____, State of_____, hereinafter designated as 'salesman,' severally agree as follows:

"The Western Oil Refining Company does by these presents hire and employ said_____, and said_____hereby agrees to sell oils, greases and steel barrels marketed by company upon such terms and for such compensation as are hereinafter set forth.

"The salesman agrees that he will, while employed as salesman, devote his entire time and best endeavors to the sale of illuminating oil, steel barrels, lubricating oils and greases marketed by the company, and that he will do no selling, advertising, or soliciting for any other person or firm, other than the company, and will only solicit business for the company in the territory which may from time to time be allotted to him, and will only sell lubricating oils and greases at prices listed in the current price list of the company, and the illuminating oil, gasoline and steel barrels at such prices as directed by the company, and will also conform to whatever instructions he may receive from the company.

"The company agrees to pay salesman a salary of_____ per day and half of said amount for half days while driving in the country soliciting for the company, and not to exceed one-half day's salary while transferring from one town to another as directed by the company, his railroad fare in going from town where he was employed to town where he is to begin canvassing, and, in the event of company ter-

minating this contract, his railroad fare from town he is canvassing to town where he is employed; but if salesman quits the employ of the company, company is not to pay railroad fare from town where he quits; company also agrees to pay railroad fare in going from one town to another as directed by the company, a reasonable amount for his board, livery hire and expenses, such as stamps, telephone, telegraph, etc., necessary for the transaction of the company's business, but the company is not to pay railroad fare or salary of any salesman in going from or to his home or any other expenses not herein provided for.

"To assist salesman in his canvass, the company agrees to furnish salesman with a sample case, instruction book, etc., the ownership of which is to remain in the company, and to insure the return of same in good condition, salesman agrees that the sum of three dollars may be deducted from his first week's salary, the amount so deducted to be paid to salesman when case and supplies are returned in good condition to the company.

"Should the company wish to use salesman as one of its traveling cashiers to make delivery of oils, etc., and receive payment therefor, salesman agrees that he will execute an indemnifying bond in the penal sum of one thousand dollars, with some reliable surety company as surety, to assure the company that he will account for all moneys of the company coming into his hands, and to secure such bond, will make and sign the necessary application to such surety company, the cost of securing such bond to be paid by the company.

"While making delivery for the company, salesman further agrees that he will, for and in behalf of the company receive shipment of oil, barrels, etc., and make delivery of same, but only on receipt of payment therefor, and cause all checks and orders received by him in payment of said oils, barrels and other merchandise, to be made payable or indorsed to the Western Oil Refining Company and that he will each day remit moneys, checks and orders received by him in payment for oil, barrels and merchandise to the office of the company at Indianapolis, Indiana.

"Should the company desire salesman to assist in making a delivery of oils, the sale of which he has solicited, the salesman agrees that he will upon notice go to the town at which delivery is being made, place his services at the disposal of the company's representative and use his best efforts in making delivery.

"While making or assisting in delivery, the company will pay salesman same salary as he would have received were his time employed as salesman.

"It is further stipulated and agreed that the company and salesman shall at any time have the right to terminate this contract of employment, and upon termination thereof, salesman agrees that he will forward sample case, instruction book and supplies to office of company.

"Signed and executed in duplicate by the above-named parties this----------day of----------.

"WESTERN OIL REFINING COMPANY.

"By----------

"----------(Seal)."

And plaintiff's said salesman, about said date, solicited and took orders for plaintiff for oil, gasoline, and greases, refined and manufactured by plaintiff, and barrels manufactured by it, from farmers and other consumers in said county of Maury, which orders were in writing and addressed to plaintiff at Indianapolis, Indiana. These orders were signed by the purchaser and also by the salesman, and each order was taken on condition that a sufficient number of orders be procured to justify a shipment to Maury County, Tennessee; and the purchase was to be delivered to the purchasers at Columbia, Tennessee, and Mount Pleasant, Tennessee, in said county, where the same was to be paid for by the purchasers at the time of delivery of the goods to them. The purchasers were given the further privilege of examining the goods in order to ascertain if they were as represented. The purchaser was given a copy of the order, and the original orders were forwarded each night after each day's canvass by said salesman to the plaintiff at Indianapolis, Indiana. The said salesman of the plaintiff took a number of orders in said county of Maury and forwarded the same to the plaintiff

at Indianapolis, Indiana, until he had a sufficient amount to justify a shipment thereon.

One of said orders in blank form is in the words and figures as follows:

WESTERN OIL REFINING COMPANY, INDIANAPOLIS, INDIANA.

Order No.---------- Date----------
Sold to John Doe.
Ship to----------, Tennessee.
Post office, ----------, Tennessee.
How ship---------- When----------
Terms, C. O. D. Tel. No.---------
50 gal. Kerosene ----------$ 6 50
1 Steel Barrel ---------- 5 50

$12 00

Purchaser, ----------
Salesman, ----------

All of said orders so taken for plaintiff by said salesman were forwarded by him from Columbia, Tennessee, and Mount Pleasant, Tennessee, to plaintiff at Indianapolis, Indiana, and there received by plaintiff; and after said orders had been received by plaintiff at Indianapolis, Indiana, it did, in response to said orders and in filling same, ship a car of oil in a railroad oil tank from Lawrenceville, Illinois, and a car of steel barrels from Indianapolis, Indiana, to itself at said town of Columbia, Maury County, Tennessee, to fill said orders so taken by the said salesman. In some instances, however, the purchasers had their own barrels, and only ordered oil without the steel barrels.

And upon the arrival of said car of oil and said car of steel barrels at Columbia, Maury County, Tennessee, by railroad, the agent of the railroad company at Columbia, Tennessee, notified plaintiff by telegraph that said cars had arrived at said town of Columbia; whereupon plaintiff, by the United States mail, from Indianapolis, Indiana, notified said purchasers of said oil and said steel barrels of the arrival of same at Columbia, Maury County,

Tennessee, and thereupon sent one of its traveling cashiers to said town of Columbia, Tennessee, to make delivery of said oil and said barrels to said persons who had given said orders for the same. And said cashier, E. C. Walker, a citizen of Indianapolis, Indiana, so sent by plaintiff from the State of Indiana to make delivery of said oils and barrels to said customers of plaintiff at Columbia, Tennessee, arrived at said town of Columbia and began to make delivery of said oils and gasoline and greases, and said barrels to said customers who had previously given said orders to the solicitor of plaintiff, who had, in turn, sent them to plaintiff at Indianapolis, Indiana, before said cars of oil and barrels were shipped from Illinois and Indiana to said town of Columbia, Tennessee; and in making delivery to said persons who had given said orders, he delivered to each customer the amount of oil, gasoline, or grease his said respective order called for, and no more, and to each the number of barrels his said respective order called for, and no more; nor did any person receive from plaintiff any oil or barrels or any other article that had not been ordered as aforesaid.

And its method of delivery of said oil and said barrels at said town of Columbia, Tennessee, was by drawing the number of gallons so ordered by the customer out of said railroad tank car into the steel barrels that had also been ordered as aforesaid, or by drawing out of said railroad tank car the number of gallons of oil so ordered by the customer into the customer's own barrel and delivering the same to said customer, and then and there receiving payment therefor at the price agreed upon when said order was taken, without said oils or barrels having ever been removed from the railroad track or from said cars in which they arrived at said town of Columbia, Tennessee, or stored in any place or warehouse, or mixed or mingled with any other property.

And plaintiff's said cashier was making collections for said oils and barrels so delivered to said customers and remitting same in full to plaintiff at Indianapolis, Indiana, each night, after each day's business; and his salary, or wages, and expenses were paid him each month by check sent to him from plaintiff at Indianapolis, Indiana; and he did not receive any part of the proceeds of the said particular car of oil and barrels so shipped to

said town of Columbia, Tennessee, when on May 29, A.D. 1914, H. W. Thomas, County Court Clerk of said Maury County, Tennessee, demanded of plaintiff that it pay him a privilege license tax for the State of Tennessee for exercising said business, which plaintiff refused to do, claiming that in taking said orders and making said sales and deliveries it was engaged in interstate commerce. Whereupon, on the 29th day of May, 1914, said H. W. Thomas, County Court Clerk, as aforesaid, issued a distress warrant against the property of plaintiff to collect said taxes, which, on said date, came to the hands of M. M. Butts, a constable of said county of Maury, who upon the same date levied said warrant upon and distrained upon oil barrels, the property of the plaintiff, in the car on the Louisville and Nashville Railroad track at said town of Columbia, Tennessee, in order to collect said taxes so demanded of plaintiff by said County Court Clerk, and would have sold same; but plaintiff, after the levy of said distress warrant and said distraint, in order that its property might not be sold under said distress warrant, paid said taxes so demanded of it by said County Court Clerk, paying the same under protest on said date—to wit, May 29, 1914.

Said distress warrant, together with said constable's return thereon, are in the words and figures as follows:

"STATE OF TENNESSEE,
"Maury County.

"*To the Sheriff or Any Constable of Maury County, State of Tennessee—Greeting:*

"Whereas, Western Oil Refining Company has been, and is now, exercising the privilege of selling or delivering oil in said county, without having first obtained license therefor:

"Now, therefore, you are hereby commanded to distrain and sell so much of the goods and chattels of said Western Oil Refining Company as shall be sufficient to pay seventy-five dollars, being the tax imposed by law in such cases made and provided, together with the fees and costs of the warrant, and to immediately execute and return the same

to me by the 30th day of May, 1914, under the penalty prescribed by law. Herein fail not.

"Witness my hand at office this 29th day of May, 1914.

[Signed] "H. W. THOMAS, Clerk.

"Per A. L. Thomas."

"[Indorsed]: Distress Warrant vs. Western Oil Refining Company. Issued May 29, 1914. H. W. Thomas, Clerk, per A. L. Thomas."

"Came to hand same day issued, and on same day I levied on fifteen oil barrels as the property of the Western Oil Refining Company for the purpose of satisfying this warrant; and on same day before advertisement for sale I returned the within warrant without sale by order of the County Court Clerk of Maury County, Tennessee, the amount distrained for and the costs having been paid to said County Court Clerk after levy

"This, May 29, 1914.

[Signed] "M. M. BUTTS,

"Constable for Maury County, Tennessee."

Plaintiff was also compelled to pay the costs of the issuance of said distress warrant and the levy of the same.

The amount of said taxes so paid the said County Court Clerk for the State of Tennessee was $37.50, and said Clerk's costs for issuing and said officer's costs for making levy were $2.50, and said Circuit Court Clerk's fees were $1.50, in all amounting to $42.50, which plaintiff was compelled to pay said County Court Clerk for the State of Tennessee as said license fee and the costs of said Clerk and said constable in order that its said property so distrained upon might not be sold.

And thereupon said County Court Clerk issued to plaintiff a privilege license, which is in the words and figures as follows:

" ORIGINAL.

" *Privilege License.*

" STATE OF TENNESSEE,
" Maury County.
" Paid under protest.

" H. W. THOMAS, Clerk.
" By A. L. Thomas."

" No. 202.

" Whereas, Western Oil Refining Company has this day applied to the Clerk of the County Court of Maury for a license to sell oil from car in said county, at city, and paid to said Clerk the sum of $37.50, the State tax, and $37.50, the county tax on said privilege:

" These are, therefore, to license you, the said Western Oil Refining Company, to exercise said privilege at any place in said county for the term of three months from the 27th day of May, 1914.

State tax	$37 50
County tax	37 50
Clerk's fee	1 00
Circuit Court	50
Total	$76 50

" H. W. THOMAS, Clerk.
" Per A. L. Thomas."

In order for plaintiff to secure a sufficient amount of orders to make up a full tank-car shipment of oil in said county of Maury, it was necessary for it to go further than the territory served by said railroad from said town of Columbia; and it went into the vicinity of said town of Mount Pleasant, Tennessee, which is 11.3 miles from said town of Columbia; and plaintiff's reason for not billing said cars to said town of Mount Pleasant from Indiana and Illinois, with stop-over allowed at Columbia, which is on the route from said points in Indiana and Illinois, was because the railroad companies receiving said shipment would not allow such stop-over privilege, though the same is allowed on nearly every other kind of shipment; and after

having completed its deliveries, as aforesaid, to said farmers and customers in said county of Maury who were most convenient to said town of Columbia, said car containing the remainder of the oil, and said car containing the remainder of said barrels, were rebilled, or reshipped, from said town of Columbia, in said county, to said town of Mount Pleasant, in said county, where the remainder of said orders so taken in said county of Maury were filled from said cars, and collections made therefor in the same manner that said deliveries and collections were made at said town of Columbia.

By filling the aforementioned orders by shipping said oil in a tank car, the freight rate from said beginning points to Columbia, Tennessee, was approximately one-half cent on the gallon cheaper than if said oil had been placed in barrels at Lawrenceville, Illinois, and shipped directly to and consigned directly to said consumers. In many cases the customer had his own barrel, and it would have been impossible to have sold him oil without selling him a barrel, unless he had have sent his barrel to the refinery to be filled and reshipped to him, or unless plaintiff had have furnished him a barrel and then had such barrel reshipped to it. The delivery of said oils by plaintiff to its said customers in filling said orders was cheaper and more convenient by railroad tank cars than by consigning same in a barrel direct to the consumer from Lawrenceville, Illinois.

The said tank car containing the oil so shipped by plaintiff to Columbia, Tennessee, arrived five or six days before the car containing the barrels arrived at said town of Columbia. The delivery of the oil was delayed awaiting the arrival of the said car containing the barrels. After the delivery was begun to said customers of plaintiff it was completed in eight days. Demurrage, or charges for cars standing on the tracks unloaded for more than forty-eight hours, was paid by plaintiff to the railroad company. The amount of said demurrage on said oil car was $17.00,, and on said barrel car was $11.00. Four days is the usual time for the completion of deliveries by the plaintiff, but in this instance, the consumption of eight days in making the delivery was occasioned by the failure of those who had given orders to plaintiff for said oil and barrels to come promptly and receive

the same. No demurrage was paid by plaintiff at said town of Mount Pleasant.

The authority under which said Clerk demanded of and collected from plaintiff said privilege tax was Section 4 of Chapter 479 of the Acts of the General Assembly of the State of Tennessee of 1909, which section, among other things, provides as follows:

> "Each and every person, firm, partnership, corporation, or local agent, having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depot for such purpose, shall pay a privilege tax as follows," etc.

Plaintiff brought this suit for the recovery of such taxes and costs so paid by it under protest within thirty days after the payment thereof, as aforesaid. (Printed Record, pages 17-24.)

ASSIGNMENTS OF ERROR.

Plaintiff in error respectfully submits that the Supreme Court of Tennessee erred in this—namely:

First: The Court erred in holding and adjudging that plaintiff in error, Western Oil Refining Company, was not entitled to recover of the defendant in error, H. W. Thomas, County Court Clerk of Maury County, Tennessee, or his successor in office, the $37.50 paid by it under protest as a privilege tax, together with the costs of the distress warrant issued against its property, because plaintiff in error was engaged solely in interstate commerce in the transaction of its business for which said tax was demanded and collected; and said tax, and the payment thereof, was a burden on its said business and a burden on and regulation of intersate commerce in violation of Section 8 of Article 1 of

the Constitution of the United States, which provides that the Congress shall have power to regulate commerce among the several States.

Second: The Court erred in finding and adjudging that plaintiff in error was liable for said privilege tax and was not entitled to recover the same, for under the laws and Constitution of the United States plaintiff in error was not liable for said tax and was entitled to recover the same.

Third: The Court erred in not finding and adjudging that Chapter 479 of the Acts of the State of Tennessee of 1909 and Section 4 thereof, and particularly the following paragraph of Section 4—under which the privilege tax was demanded and collected of plaintiff in error—which paragraph is as follows—to wit:

> "Each and every person, firm, partnership, corporation, or local agent, having oil depots, storage tanks, or warehouses for the purpose of selling, delivering or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purpose shall pay a privilege tax"—

was in violation of the Constitution of the United States, and particularly Section 8 of Article 1 thereof, above referred to.

Fourth: The Court erred in not finding and adjudging that plaintiff in error, in rebilling its oil car and barrel car from Columbia, Tennessee, to Mount Pleasant, Tennessee, and making delivery of said oil and barrels at said town of Mount Pleasant and collecting for the same, was engaged solely in interstate commerce, and, therefore, not liable for said privilege tax to the State of Tennessee.

Fifth: The Court erred in not finding and adjudging that plaintiff in error was engaged solely in interstate commerce and protected from the payment to the State of Tennessee of privi-

lege tax under Chapter 479 of the Acts of Tennessee of 1909 by Section 8 of Article 1 of the Constitution of the United States, when it, an Indiana corporation, resident at Indianapolis, Indiana, and having no office or local agent in the State of Tennessee, nor any warehouse or storage house in the State of Tennessee, sent its traveling salesmen, who were residents of Indiana, into the State of Tennessee and there solicited and received written orders from citizens of Tennessee, addressed to it at Indianapolis, Indiana, and there received by it; and in response to such orders so received, and in filling the same, it shipped by railroad from Lawrenceville, Illinois, a tank car filled with oil, and from Indianapolis, Indiana, a car filled with barrels, to fill such orders so taken in Tennessee, in Maury County, to Columbia, Tennessee, in said county, and, after filling such orders from such citizens as were convenient to Columbia, rebilled said cars by railroad to Mount Pleasant, Tennessee, in said county, to fill such orders from such citizens as were convenient to Mount Pleasant, Tennessee, a distance of 11.3 miles from Columbia, Tennessee. The reason this reshipment of said cars of oil and barrels was made from Columbia to Mount Pleasant was because it was cheaper and more convenient to ship said cars to fill said orders in Maury County and rebill same from Columbia to Mount Pleasant than it was to make a direct shipment from said cities in Illinois and Indiana to Columbia and to Mount Pleasant, and for the further reason that the railroad company receiving said shipment refused to allow plaintiff in error a "stop-over" at Columbia with said cars with Mount Pleasant as their final destination. Both of said cars loaded with oil and barrels, as aforesaid, were started on this interstate journey with the intention on the part of plaintiff in error to fill said orders at both Columbia and Mount Pleasant when said shipments were made. And said business and said transactions, including said shipments, was commerce between the States of Tennessee and Indiana and Illinois and between the citizens of said respective States; and the plaintiff was not, therefore, liable for said privilege tax to the State of Tennessee, and the State of Tennessee was inhibited under Section 8 of Article 1 of the Constitution of the United States from collecting or seeking to collect said tax off of plaintiff in error; and the collection of said tax was and is a regula-

tion of interstate commerce and of plaintiff in error's business, and is, therefore, a burden upon interstate commerce; and Chapter 479 of the Acts of Tennessee of 1909, in so far as the same imposes a tax upon plaintiff in error's said business, is in violation of the Constitution and laws of the United States, and especially in violation of Section 8 of Article 1 of the Constitution of the United States.

ARGUMENT.

While the assignments of error in this case number five, yet they in effect present in varying forms that the Tennessee Supreme Court erred in holding that the rebilling of plaintiff in error's cars of products from Columbia to Mount Pleasant, in the same State, was intrastate commerce and permitting it to be taxed as such.

In the case of Western Oil Refining Company vs. Dalton, Clerk, decided by the Supreme Court of Tennessee at its December term, 1914, and reported in 131 Tennessee 329, the identical facts were before that Court as in the present case, save the rebilling feature; and that Court decided in the Dalton case that plaintiff in error's business was protected from privilege tax sought to be imposed upon it by reason of the provisions of the commerce clause of the Federal Constitution.

Western Oil Refining Co. v. Dalton, 131 Tenn. 329.

In delivering the opinion in the present case, the Tennessee Supreme Court said:

> "Save in one particular, to be noted hereafter, this case is similar to the case of Western Oil Refining Company v. Lytle Dalton, Clerk of the Trousdale County Court, 130 Tenn. ---------, decided at a former day of the term. In the case of Western Oil Refining Company v. Dalton, supra, we concluded that the plaintiff was protected from the privilege tax sought to be imposed upon it by reason of the provisions of the commerce clause of the Federal Constitu-

tion, as interpreted by the decisions of the United States Supreme Court referred to in the opinion therein. This case seems to us distinguishable from the case of Western Oil Refining Company v. Dalton, supra, for the reason that the tank car from which distribution was made at Mount Pleasant came to Mount Pleasant under a local or intrastate billing. The car was shipped from Indiana to Columbia, where part of its contents were distributed, and the car was then rebilled from there to Mount Pleasant. Columbia and Mount Pleasant are both towns within the State of Tennessee. We think that by reason of the manner in which this car was handled and the rebilling thereof at Columbia to Mount Pleasant, the plaintiff below became liable for the tax imposed by Chapter 479 of the Acts of 1909 upon persons, firms, partnerships, corporations, etc., delivering or distributing oil from a railroad car. It was a distributor at Mount Pleasant, and the shipment came to Mount Pleasant under a local billing from another point within the State of Tennessee. We are of opinion that the case of Gulf R. R. v. Texas, 204 U. S. 412, 51 Law ed. 546, justifies the distinction we have made."

(Printed Record, page 11.)

The agreed facts of this case, pertaining to the rebilling, show that said car of oil and said car of barrels were shipped into Tennessee to fill orders it had received from farmers in Maury County, Tennessee, in the vicinities of Columbia and Mount Pleasant, in said county, and that " in order for plaintiff to secure a sufficient number of orders to make up a full tank-car shipment of oil to said county of Maury, it was necessary for it to go further than the territory served by said railroad from said town of Columbia, and it went into the vicinity of said town of Mount Pleasant, which is 11.3 miles from said town of Columbia; and plaintiff's reason for not billing cars to said town of Mount Pleasant from Indiana and Illinois, with stop-over allowed at Columbia, which is on the route from said points in Indiana and Illinois, was because the railroad companies receiving said shipment would not allow such stop-over privilege, though the same is allowed on nearly every other kind of shipment; and

after having completed its deliveries, as aforesaid, to said farmers and customers in said county of Maury who were most convenient to said town of Columbia, said car, containing the remainder of the oil and said car containing the remainder of said barrels, were rebilled, or reshipped, from said town of Columbia, in said county, to said town of Mount Pleasant, in said county, where the remainder of said orders so taken in said county of Maury were filled from said cars, and collections made therefor in the same manner that said deliveries and collections were made at said town of Columbia, Tennessee.

"By filling the aforementioned orders by shipping said oil in a tank car, the freight rate from the said beginning points to Columbia, Tennessee, was approximately one-half cent on the gallon cheaper than if said oil had been placed in barrels at Lawrenceville, Illinois, and shipped directly to and consigned directly to said consumers. In many cases the customer had his own barrel, and it would have been impossible to have sold him oil without selling him a barrel, unless he had have sent his barrel to the refinery to be filled and reshipped to him, or unless plaintiff had have furnished him a barrel and then had such barrel reshipped to it. The delivery of said oils by plaintiff to its said customers in filling said orders was cheaper and more convenient by railroad tank cars than by consigning same in a barrel direct to the consumer from Lawrenceville, Illinois." (Printed Record, pages 23, 24.)

The Supreme Court of Tennessee says: "We are of opinion that the case of Gulf R. R. v. Texas, 204 U. S. 412, 51 Law ed. 546, justifies the distinction we have made"—that is, that the reshipment or rebilling from Columbia to Mount Pleasant distinguishes this case from that of Western Oil Refining Company v. Dalton, decided by that Court.

The distinguishing features between the present case and the Gulf R. R. v. Texas case are these:

1. That the suit was between the State of Texas and a railroad as to the right of the State to enforce a freight rate. The case at bar is a suit between the shipper and the State of Tennessee as to the right of the State to collect a privilege tax.

2. In that case Harroun Commission Company sold to Hardin

Grain Company two cars of corn to be delivered to the Grain Company at Texarkana, Texas. The Harroun Commission Company filled its contract with the Grain Company by delivering said two cars of corn to said Grain Company at Texarkana. The contract between said Grain Company and the Commission Company had been fulfilled by delivery at Texarkana of the corn and the payment by the said Grain Company to said Commission Company of the price of the corn. The corn came to Texarkana consigned to the order of Forrester Brothers, with notification to be given the Commission Company. Upon delivery of the corn by the Commission Company to the Grain Company at Texarkana, the corn was then shipped on a new bill of lading, made out for the first time to Hardin Grain Company, consigned to its order at Goldthwaite, Texas, with instruction to the railroad company to notify Saylor & Burnett, to whom the Grain Company had sold the corn. Here are two sales, two deliveries, a change of title, and a recognition of the change of title by a bill of lading made out to the new owner of the corn, payment made at first delivery and change of title.

In the case at bar, the oil was sent from Indiana to Maury County, Tennessee, to fill orders previously taken there, and a stop was made at Columbia for the convenience of customers near there, and the car was then rebilled to Mount Pleasant to complete the deliveries in Maury County. The cars were billed to Columbia and then rebilled from there to Mount Pleasant in each instance to the plaintiff in error, and the reason the cars were not in the first instance billed to Mount Pleasant, with stopover at Columbia, was because such was not permitted by the railroads.

3. In that case the Harroun Commission Company had already contracted, before the Hardin Grain Company ordered the corn from it, to have the two cars delivered to it, the Commission Company, at Texarkana, and these were the two cars delivered to it there. It is not insisted that when the Commission Company contracted in the first instance for Forrester Brothers to deliver it the two cars of corn at Texarkana, it had any thought of this corn going to Goldthwaite.

In the present case the cars were started on their interstate journey into Tennessee with no other intention at any time on

the part of the oil company but that they would go to Columbia and Mount Pleasant, in Maury County.

Furthermore, in the case of Gulf R. R. v. Texas, this Court seems to be looking at the case from the standpoint of the position occupied by the carrier, not the shipper, and what the carrier should rely upon in determining whether it shall treat a shipment as intrastate or interstate commerce, for the decision continues:

> "In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it had made, know whether it was bound to obey the State or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract."
>
> See Gulf C. & S. F. R. Co. v. Texas, 204 U. S. 414, 51 Law ed. 547.

The late case of Chicago, etc., Ry. Co. v. Iowa recognizes a distinction to be drawn between the position occupied by a shipper and that of a carrier when it is confronted with deciding whether the shipment is to be treated by it as interstate or intrastate commerce.

> See Chicago, etc., Ry. Co. v. Iowa, 233 U. S. 334, 58 Law ed. 988.

In Texas, etc., Ry. Co. v. Sabine Tram Co., the Tram Company relied upon the authority of Gulf R. R. v. Texas, supra, to sustain its contention that it was not engaged in interstate commerce. The Tram Company operated wharves and docks on the Texas Gulf Coast, but owned no railroads. Lumber, originating in the State of Texas and shipped on local bills of lading, was concentrated on the Tram Company's wharves for export to foreign countries, the local bills of lading being made in the name of the seller; and the lumber was unloaded by the purchaser's order into slips, or docks, in reach of the ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports. This Court held that the Tram

Company was engaged in interstate commerce, although the seller had no further connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and had no knowledge thereof, and although the lumber had no foreign destination at the time of the initial shipment.

This Court, in the Texas v. Tram Company case, in commenting upon the case of Gulf R. R. v. Texas, supra, said:

> "This Court affirmed the judgment, and decided that the contract between the Hardin Grain Company and the Harroun Commission Company was completed in accordance with its terms when the corn was delivered to the Hardin Grain Company at Texarkana, Texas. 'Then, and not till then,' it was said, 'did the Hardin Grain Company have full title to and control of the corn, and that was after the first contract of transportation, had been completed.' Then, and not till then, we may say, did the Hardin Grain Company acquire the means of fulfilling its contract with Saylor & Burnett; and then, and not till then, did it start to fulfill its contract with Saylor & Burnett. This was the determining circumstance both in the Supreme Court of Texas and in this Court. It caused the Supreme Court of Texas to decide that the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City. It caused this Court, in effect, to adopt that ruling and to consider the corn not at any time to be that of Saylor & Burnett until it was started from Texarkana to Goldthwaite. It appeared that the corn remained five days in Texarkana; and, considering the bearing of this fact and the other facts, it was said: 'The Hardin Grain Company was under no obligation to ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Grain Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Grain Company. Then, and not till

then, did the Hardin Grain Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.'

"It is manifest that these facts were the determining ones, and the history of the corn prior to its arrival at Texarkana was put aside as irrelevant, and the controlling fact decided to be that the corn belonging to the Hardin Grain Company was shipped from Texarkana to Goldthwaite, a strictly local shipment. This was the view taken of the case in Railroad Commission v. Worthington, 225 U. S. 101, 56 Law ed. 1004, 32 Sup. Ct. Rep. 653. It was there *urged* to sustain the contention *that the manner of billing was controlling of the character of commerce. The contention* was *rejected,* and, distinguishing the case and speaking of its facts, the Court said: 'The facts showed that the corn was carried upon a bill of lading from Hudson, South Dakota, to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment, unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite; for, as this Court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment.' Distinguishing the case, it was said: 'It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed."

Texas, etc., Ry. Co. v. Sabine Tram Co., 227 U. S. 113, 57 Law ed. 442.

The Circuit Judge, in deciding the case at Columbia, which was before the decision by the Supreme Court of Tennessee of the case of Western Oil Refining Company v. Dalton, 131 Tenn. 329, in disposing of the rebilling from Columbia to Mount Pleasant, said:

"As to the reshipment from Columbia to Mount Pleasant, it is apparent that the shipper started the goods with the intent and purpose that their ultimate destination should be Mount Pleasant and the purchasers there. So long as that purpose was in view, no reason can be given why the shipper cannot take advantage of any number of transportation companies or reshipments. The framers of the Constitution knew nothing of the immense transportation systems now existing, but must have contemplated that goods would be shipped in many ways and by broken journeys. The change from one transportation company to another or reshipping over the same lines does not break the continuity of the shipment. Terminal Company v. Inter. C. C., 55 Law ed. U. S. 320."

(Printed Record, page 30.)

In said case of Terminal Company v. Inter. C. C., referred to by said Circuit Judge, the Terminal Company, owning no railroads, but doing a wharfing business at Galveston, Texas, contended that it was not subject to the control of the Federal Commerce Commission. By railroad, products from other points were concentrated on its wharves for export, the bills of lading calling only for Galveston. In that case this Court said:

" In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the reshipment of the products in export trade, and their regulation is in the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, *the substance of things and make evasions of the Act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas.* They were all destined for export, and by their delivery to the G. H. & S. A. Ry. they must be considered as having been delivered to a carrier for

transportation to their foreign destination, and the Terminal Company being a part of the railway for such purpose."

Terminal Company v. Inter. C. C., 219 U. S. 527, 55 Law ed. 320.

In Chicago, etc., Ry. Company v. Iowa, this Court said:

"It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract. Railroad Company v. Worthington, 225 U. S. 101, 56 Law ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Company v. Sabine Tram Company, 227 U. S. 111, 57 Law ed. 442, 32 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Company, 229 U. S. 336, 57 Law ed. 1215, 33 Sup. Ct. Rep. 837.

". . . The question is with respect to the actual movement in the particular case."

Chicago, etc., Ry. Co. v. Iowa, 233 U. S. 334, 58 Law ed. 988.

Purely internal commerce is that which is carried on between man and man in a State, or between different parts of the same State, and does not extend to or affect other States.

See Gibbons v. Ogden, 9 Wheat 193, 6 Law ed. 69, 70.

"Commerce with foreign countries and among the several States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

County of Mobile v. Kimball, 102 U. S. 691, 26 Law ed. 238.

If the original intention when making the shipment was to make a point in another State the final destination, and such purpose is not abandoned, transportation in pursuance of such intention between two points in such other State is interstate, al-

though this local transportation was not under a through bill of lading.

Gulf Coast & F. R. Co. v. Fort Grain Co. (Texas Civil Appeals), 72 S. W. 419, 73 S. W. 845.

The origin and destination of freight controls, and the fact that one or more carriers in the route transport wholly within the State of destination is not material.

The Daniel Ball v. United States, 10 Wall. 557, 19 Law ed. 999;

Coe v. Erroll, 116 U. S. 517, 29 Law ed. 715, 6 Sup. Ct. Rep. 745;

Cutting v. Florida, R. & Nav. Co., 3 Inst. Com. Rep. 665, 46 Fed. 641;

Houston Direct Nav. Co. v. Ins. Co., 89 Texas 1, 30 L. R. A. 713.

Where transportation of goods destined for points without the State has been actually begun, temporary stoppage within the State, which is ultimately completed, will not deprive the transportation of its character of interstate commerce.

American Exposition Co. v. Iowa, 196 U. S. 133, 49 Law ed. 417, 25 Sup. Ct. Rep. 182;

Kelley v. Rhoads, 188 U. S. 1, 47 Law ed. 359, 23 Sup. Ct. Rep. 259;

Rhoads v. Iowa, 170 U. S. 412, 42 Law ed. 1088, 18 Sup. Ct. Rep. 664;

Delaware v. Hudson Canal Co. c. Com., 1 Moneghan (Pa.) 36, 1 L. R. A. 232, 2 Intr. Com. Rep. 222, 17 Atl. 175.

In the case of South Covington, etc., R. Company v. Covington, decided at the October term, 1914, this Court said:

> "This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done; and if the transportation is really and in fact between States, the mere arrangements of billing or plurality of carriers do not enter into the conclusion.

". . . Texas & N. O. R. Co. v. Sabine Tram Company, 227 U. S. 111, 57 Law ed. 442, 33 Sup. Ct. Rep. 229; St. Louis S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 Law ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Railroad Commission v. Worthington, 225 U. S. 101, 56 Law ed. 1004, 32 Sup. Ct. Rep. 653; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 336, 57 Law ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890."

South Covington, etc., R. Co. v. Covington, 235 U. S. 544, 59 Law ed. 353.

We contend that because one shipment instead of two was made to Maury County, Tennessee, to fill the orders sent to plaintiff in error at Indianapolis, Indiana, from Maury County, does not change the character of the transaction to intrastate commerce because of the rebilling from Columbia to Mount Pleasant, 11.3 miles distant, especially in view of the fact that a direct billing to Mount Pleasant, with Columbia stop-over, could not be had, and that to ship partially filled cars direct to both points would have been more expensive and less businesslike.

There is no question but that citizens of different States have had transactions with each other which is interstate commerce. Their means and methods of conducting these transactions were most natural, the most economical, and the most businesslike they could devise. To say that they shall conduct their transactions in some manner more expensive and unbusinesslike, or else be liable for a privilege tax, is, we contend, placing a burden upon and an attempt to regulate interstate commerce; and the judgment of the Supreme Court of Tennessee should be reversed and the judgment of the Circuit Court for Maury County, Tennessee, be affirmed.

Respectfully submitted,

H. C. TRUE,

A. L. DORSEY,

Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
DEC 9 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 168.

WESTERN OIL REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

A. W. LIPSCOMB, CLERK OF THE COUNTY COURT OF MAURY COUNTY, STATE OF TENNESSEE, AS SUCCESSOR IN OFFICE TO H. W. THOMAS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

ORIGINAL AND REPLY BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

BY FRANK M. THOMPSON,
Attorney General of Tennessee.

(24,800)

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ORIGINAL AND REPLY BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR, BY FRANK M. THOMPSON, ATTORNEY GENERAL OF TENNESSEE.

Prefatory Statement.

The plaintiff in error, Western Oil Refining Company, will hereinafter be designated simply as "plaintiff," while the defendant, A. W. Lipscomb, as the successor of H. W.

Thomas as clerk of the County Court of Maury County, will be designated simply as "defendant."

A distress warrant was issued against the plaintiff for the recovery of the privilege tax fixed by the statute hereinafter set out, and to avoid its levy upon the property of the plaintiff it paid the amount of said privilege tax, with costs, under protest, taking a receipt therefor, and then instituted a suit before a justice of the peace against the defendant to recover the same, as it had a right to do under the laws of Tennessee. A judgment was rendered against the plaintiff by the justice. The case was then carried to the Circuit Court for Maury County, Tennessee, by appeal, and there tried by the judge, without the intervention of a jury, who decided the case in favor of the plaintiff, holding that the oil in question was protected by the commerce clause of the Constitution, both at Columbia and at Mount Pleasant. There is a written opinion of the judge in the transcript. The case was then appealed to the Supreme Court of the State, which is the court of last resort in Tennessee. It was there briefed, argued, and tried along with the case of Western Oil Refining Company *vs.* Lytle Dalton. The Dalton case was decided in favor of the plaintiff, the court holding that the oil and barrels as shipped to Hartsville, and the manner of drawing the oil from the tank and placing it in the barrels, and the delivery of the same to purchasers, constituted interstate commerce, and that therefore the same was protected by the commerce clause of the Constitution, and that said act, section 4 of chapter 479 of the Acts of 1909, was, as to said transaction, void. But as to the instant case, the court decided that the reshipment of the oil in barrels from Columbia to Mount Pleasant, or that portion of the same that was left after the deliveries had been made at Columbia and the deliveries made at Mount Pleasant, constituted an intrastate transaction, and therefore held the plaintiff amenable to said tax under said section of the act. Thereupon, a writ of error was taken to bring the case to this court. The Dalton case was decided by Mr. Justice Williams, of the Supreme Court

of Tennessee, and is found in 4 Thompson (131 Tenn.), 329. The instant case was decided by Mr. Justice Green, and an authenticated copy of his opinion is in the transcript and will be dealt with hereinafter.

I.

History of the Proceedings and Trial Before the Justice of the Peace.

(1.) The distress warrant was issued by the defendant against the plaintiff for the said tax on the 29th day of May, 1914, and is to be found in Tr., p. 42.

(2.) The act, or rather so much of it as is material to the issues in this case, is as follows:

> "SECTION 4. *Be it further enacted,* That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by the law for the collection of revenue."

Then, as a part of said section 4, is the following:

> "Sheet Acts, 1909, p. 1727.
>
> *"Coal Oil, Illuminating Oil, or Lubricating Oil, or Petroleum Products.*
>
> "Each and every person, firm, partnership, corporation, or local agent having oil depots, storage tanks or warehouses for the purpose of selling, delivering, or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purpose, shall pay a privilege tax as follows:
> "In cities, towns, and taxing districts of 30,000

of the limits of such city, town, or taxing district, each, per annum, $300.00.

"In cities, towns, or taxing districts of from 10,000 inhabitants or over, or in territories within five miles to 30,000 inhabitants, or in territories within five miles of the limits of such city, town, or taxing district, each, per annum, $200.00.

"In cities, towns, or taxing districts of from 5,000 to 10,000 inhabitants, or in territories within five miles of the limits of such city, town, or taxing district, each, per annum, $150.00.

"In cities, towns, or taxing districts of from 2,000 to 5,000 inhabitants, or in territories within five miles of the limits of such city, town, or taxing district, each, per annum, $75.00.

"In cities, towns, or taxing districts of less than 2,000 inhabitants, or in territories within five miles of the limits of such city, town, or taxing district, each, per annum, $50.00.

"Selling directly to the consumer from wagons or tanks shall pay as peddlers.

"This shall not apply to merchants keeping oil for sale and paying a general merchant's tax.

"*Provided*, that part of the common stock composed of coal oil, lubricating oil, or petroleum products does not exceed five per cent of the entire common stock of such merchants. This shall not exempt merchants who handle oils on commissions or as agents."

Sheet Acts, 1909, p. 1734.

The fourteenth section of said act is as follows:

"SECTION 14. *Be it further enacted*, That any and all parties, firms, and corporations exercising any of the foregoing privileges must pay the tax as set forth in this act, for the exercising of said privilege, whether they make a business of it or not, unless otherwise provided; and this act shall not be so construed as to exempt any person, firm, or corporation whatever exercising any of the foregoing privileges from the payment of the tax herein prescribed for the exercise of said privileges as herein provided, and except as provided in chapter 121 of the acts of 1869 and 1870, excepting State and county fairs and their tenants."

Sheet Acts, 1909, pp. 1758 and 1759.

The sixteenth section of said act is as follows:

> "SECTION 16. *Be it further enacted,* That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10.00, or more than $50.00, for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."
>
> Sheet Acts, 1909, p. 1759.

(3.) This action was instituted on the 11th day of June, 1914, by the said H. W. Thomas, as such clerk, before one W. E. Alexander, a justice of the peace for said county, to recover the sum of $37.50 privilege tax under the foregoing-quoted statute, together with $4.50 costs, making a total of $42.00, which sum was paid by the plaintiff under protest under the levy of said distress warrant upon certain oils and barrels of the plaintiff.

Tr., pp. 12-13.

(4.) Subsequently, and on September 10, 1914, the death of the said Thomas and the election of the said Lipscomb as his successor in office was suggested and proven, and the case revived against Lipscomb as such successor.

Tr., pp. 14 and 15.

(5.) On said date, to-wit, September 10, 1914, the said justice rendered a judgment against the plaintiff, whereupon he prayed, obtained, and perfected an appeal by the execution of an appeal bond to the Circuit Court of Maury County.

Tr., p. 16.

(6.) Upon the transmission of the papers from the said justice court to the circuit court, the plaintiff was by motion permitted to amend its warrant by making additional averments to those contained in the original one.

Tr., pp. 16 and 17.

(7.) It is not deemed necessary at this point to state the averments of either the original or amended warrant, as they sufficiently state a cause of action upon the agreed state of facts, upon which the case was tried in the said circuit court.

II.

Proceedings, Agreed State of Facts, and Trial of the Case in the Circuit Court, and Appeal to the Supreme Court.

At the November term, 1914, and on the 21st day of November, there was filed in said circuit court an agreed state of facts, upon which the case was heard by the court without the intervention of a jury, and which agreed state of facts disclosed the following:

(1.) The plaintiff is a corporation organized under the laws of Indiana, with a capital of $15,000.00. It has no branch office, no office or agency in the State of Tennessee, and never did have. It does not now nor has it ever owned or leased any warehouse or warehouses in the State of Tennessee. It has a refinery at Lawrenceville, in the State of Illinois, where it refines crude petroleum into illuminating oil, gasoline and lubricating oils and greases, all of which it sells direct to the consumer. It also manufactures in the State of Indiana steel barrels, which it sells direct to the consumer.

Tr., p. 17.

(2.) It markets its products through the medium of travelling salesmen or solicitors. That one of these travelling salesmen, who resides in Indiana, on or about the — day of May, 1914, went to Columbia, Maury County, Tennessee, to solicit business for plaintiff. That it had a contract with said salesman, the provisions of which are as follows:

(*a*) Said salesman agreed that he would, while employed by the plaintiff, devote his entire time and best efforts to the sale of illuminating oil, steel barrels, lubricating oils and greases manufactured by plaintiff, and that he would do no selling, advertising or soliciting for anyone else, and would only solicit business for plaintiff in the territory which might from time to time be allotted to him, and that he would only sell oils and greases at the prices listed in the current price list of plaintiff, and illuminating oil, gasoline and steel barrels at such prices as should be directed by said plaintiff, and that he would conform to whatever instructions he might receive from said plaintiff.

Tr., p. 18.

(*b*) Plaintiff agreed to pay said salesman a salary of $— per day, and half of said amount for half days, while driving into the country soliciting for said plaintiff, and not to exceed one-half day's salary while transferring from one town to another as directed by said plaintiff. That it would pay his railroad fare in going from the town where he was employed to the town where he was to be canvassing. But in the event plaintiff terminated the contract said salesman's railroad fare from the town where he was canvassing to the town where he was employed was to be paid. However, if said salesman quit the employment of the plaintiff, then it was not to pay his railroad fare. The plaintiff further agreed to pay said salesman's fare from one town to another when it directed him to go; also a reasonable amount for his board, livery hire and expenses such as stamps, telephoning and telegraphing necessary for the transaction of the company's business. It further agreed to furnish the salesman with sample case, instruction book, etc., but the ownership of same was to be retained in plaintiff.

Tr., pp. 18 and 19.

(*c*) The salesman agreed that if plaintiff desired to use him as a travelling cashier to make delivery of said oils and

barrels, that he would execute an indemnifying bond in the sum of $1,000.00 with a surety company, to assure plaintiff that he would account for all money belonging to it, coming into his hands. He further agreed that he would make delivery for the plaintiff of all shipments of oil, barrels, etc., but only on receipt of payment therefor, and that he would cause all checks and orders received by him in payment for oils and barrels to be made payable, or endorsed, to the plaintiff, and that he would each day remit all moneys, checks, and orders received by him to the plaintiff at Indianapolis, Indiana. He further agreed that in the event plaintiff desired him to make delivery of oils which he had previously solicited or sold that he would immediately go to the place and tender his services to the disposal of the company's agent there. He was to receive the same salary while making said delivery that he would while soliciting orders.

Tr., p. 19.

(3.) That a salesman of the plaintiff, about said date, to-wit, in May, 1914, solicited and took orders for plaintiff for oil, gasoline and greases, refined and manufactured by plaintiff, and also for barrels manufactured by it, from farmers and other consumers in said county of Maury, which orders were in writing, addressed to the plaintiff at Indianapolis, Indiana, and which were signed by the purchaser and also by the salesman, and each of which was taken on condition that a sufficient number of orders could be procured to justify a shipment to Maury County, and the purchases were to be delivered to the purchasers at Columbia, Tennessee, and Mount Pleasant, Tennessee, in said county, where the same were to be paid for by the purchasers at the time of the delivery of the goods. The purchasers were given the privilege of examining the goods to ascertain if they were as represented. Each purchaser was given a copy of his order, but the original was mailed to the plaintiff at

Indianapolis. One of said orders, in blank, is in the words and figures following:

"WESTERN OIL REFINING COMPANY,
INDIANAPOLIS, INDIANA.

"Order No. ——. Date ————.
Sold to John Doe.
Ship to ————, Tennessee.
Postoffice, ————, Tennessee.
How ship, ————. When, ————.
Terms, C. O. D. Tell. No. ——.

50 gal. kerosene	$6.50
1 steel barrel	5.50
	$12.00

Purchaser, ————.
Salesman, ————."

Tr., p. 20.

(4.) After the receipt of said orders plaintiff shipped a car of oil in a railroad oil tank from Lawrenceville, Illinois, and a car of steel barrels from Indianapolis, Indiana, to itself at said town of Columbia, Maury County, Tennessee, to fill said orders so taken by the said salesman. In some instances, however, the purchasers had their own barrels and only ordered oil without the steel barrels. Upon the arrival of said car of oil, and said car of steel barrels, at Columbia, Maury County, Tennessee, the railroad agent at Columbia, Tennessee, notified the plaintiff by telegram that said cars had arrived at said town of Columbia; whereupon, the plaintiff, by United States mail from Indianapolis, notified said purchasers that said oil and steel barrels had arrived at Columbia, and sent one of its travelling cashiers to the said town to make delivery of said oil and said barrels to the purchasers who had given said orders. That said cashier, E. C. Walker, a citizen of Indianapolis, Indiana, was sent by plaintiff from the State of Indiana, and arrived at said town of Columbia, in the county of Maury, to make delivery

of said oil, gasoline and greases, and said barrels, to said customers who had previously given their orders to the solicitors of the plaintiff, and in making delivery to said purchasers who had given said orders he delivered to each purchaser the amount of oil, gasoline or greases his respective order called for, and no more, and to each the number of barrels his respective order called for, and no more, nor did any person receive from plaintiff any oil or barrels, or any other purchase, that had not been ordered, as aforesaid.

(5.) The method of delivery by said Walker was by drawing the number of gallons so ordered by the customer out of said railroad tank car into the steel barrels that had also been ordered, as aforesaid, or by drawing out of said railroad tank car the number of gallons of oil that had been ordered by the customer into the customer's own barrel, and delivering same to said customer, and then and there receiving payment therefor at the price agreed upon when said order was taken, without said oil or barrels having ever been removed from the said railroad tracks, or from said cars in which they arrived at said town of Columbia, or having ever been stored in any place or warehouse.

(6.) The plaintiff's said cashier was making collections for said oils and barrels from said customers and remitting the same in full to the plaintiff at Indianapolis each night, after each day's business. His salary and expenses were paid each month by checks sent from Indianapolis, Indiana. He did not receive any part of the proceeds of the said car of oil and barrels so shipped to the town of Columbia.

On May 29, 1914, the said Thomas, county court clerk of Maury county, demanded of plaintiff that it pay him a privilege tax for the State of Tennessee, for exercising said business, which plaintiff refused to do, claiming that in taking said orders and making said sales and deliveries that it was engaged in interstate commerce. Thereupon, on the 29th of May, 1914, the said Thomas issued a distress warrant

against the property of plaintiff to collect said tax, which went into the hands of one M. M. Butts, a constable, and who on said date levied upon certain oil barrels, the property of the plaintiff, in the cars on the Louisville & Nashville Railroad tracks at Columbia. That after the levy of said distress warrant, in order that its property might not be sold, plaintiff paid the tax.

Tr., pp. 21 and 22.

(7.) In order that the plaintiff might secure a sufficient number of orders to make up a full tank-car shipment of oil in said county of Maury, it was necessary for it to go further than the territory served by the railroad at the said town of Columbia, and it went into the vicinity of the town of Mount Pleasant, which is eleven and three-tenths (11.3) miles from the town of Columbia. Plaintiff's reason for not billing said cars to said town of Mount Pleasant from Indiana and Illinois, with stop-over at Columbia, which is en route from Indiana and Illinois, was because the railroad companies receiving said shipment would not allow such stop-over privilege, though the same is allowed in nearly every other kind of shipment. After having completed its deliveries, as aforesaid, to said customers at Columbia, said car containing the remainder of said barrels, and said car containing the remainder of said oils, were rebilled and reshipped from the town of Columbia, in said Maury county, to the town of Mount Pleasant, in said county, where the remainder of said orders so taken in said county of Maury were filled from the said cars, and collections made therefor in the same manner that the said deliveries and collections were made at said town of Columbia.

Tr., pp. 23 and 24.

(8.) That by filling the aforementioned orders by shipping said oil in tank cars, the freight rate from said beginning point to Columbia was approximately one-half cent on the gallon cheaper than if said oil had been placed in barrels

at Lawrenceville, Illinois, shipped directly to and consigned directly to said consumer.

Tr., p. 24.

(9.) In many cases the customer had his own barrel, and it would have been impossible to have sold him his oil without selling him a barrel, unless he had sent his barrel to the refinery to be filled and shipped to him, or unless plaintiff had furnished him a barrel and then had such barrel reshipped to it.

Tr., p. 24.

(10.) The said tank car containing the oil was shipped by the plaintiff to Columbia, arriving five or six days before the car containing the barrels arrived at said town of Columbia. The delivery of the oil was delayed, awaiting the arrival of said car containing the barrels. After the delivery to said customers was begun, it was completed in eight days. Demurrage, or charges for the cars standing on the tracks unloaded for more than forty-eight hours, was paid by the plaintiff to the railroad company, the amount of said demurrage on said oil car being $17.00, and on said barrel car, $11.00. Four days is the usual time for the completion of deliveries by the plaintiff, but in this instance the consumption of eight days in making the delivery was occasioned by the failure of those who had given orders to plaintiff for said oils and barrels to come promptly and receive same.

Tr., p. 24.

(11.) The plaintiff brought this suit for the recovery of said taxes and costs so paid by it under protest, within thirty days after the payment thereof, as aforesaid.

Tr., p. 24.

Disposition of the Case.

(1.) After an examination of the foregoing agreed state of facts, and after the argument of the case, the court rendered a judgment in favor of the plaintiff, against the defendant.

Tr., pp. 30 and 31.

(2.) The learned circuit judge prepared a written opinion giving his reasons therefor and citing authorities. Without going into the reasoning of the court in this opinion, which will be found in the Transcript, at pages 26 to 29, both inclusive, it is sufficient to say the court was of opinion that said chapter 479, in its application to the business transacted by the plaintiff, as disclosed in this agreed state of facts, was violative of the Federal Constitution, in that the court reached the conclusion that the plaintiff, under the facts disclosed, was engaged in interstate commerce, and not intrastate commerce.

Tr., pp. 26 to 29.

(3.) A motion for a new trial was interposed, which is in writing and which is to be found in the Transcript, at pages 31 and 32. The grounds of this motion, briefly stated, are these: (*a*) That there was no evidence to sustain the findings and judgment of the court. (*b*) Because under the laws of the State of Tennessee the plaintiff was liable for said privilege tax. (*c*) Because if the original transaction and shipment were interstate commerce, the character of the transaction changed from interstate commerce to intrastate commerce when said cars were rebilled to Mount Pleasant, Tennessee, from Columbia, and deliveries there made. (*d*) Because when said oils were put in said barrels and then delivered to the purchasers, all in Tennessee, the transaction lost its character as interstate commerce, and plaintiff thereupon became liable for said privilege tax.

Tr., pp. 31 and 32.

This motion was overruled and thereupon a bill of exceptions was prepared, signed, and sealed, and the case properly appealed to the Supreme Court of Tennessee.

Tr., p. 32.

III.

History of the Proceedings and Trial in the Supreme Court of Tennessee.

The case was tried in this court upon the following assignments of error:

(1.) Because there was no evidence to sustain the finding and judgment of the circuit court when it rendered its decision sustaining the suit, when it overruled the motion of the defendant for a new trial upon the said grounds, and when it entered its final judgment.

(2.) The circuit court erred in rendering said judgment and in overruling said motion upon the second ground thereof, because under the laws of the State of Tennessee the said plaintiff was and is liable for the said privilege tax.

(3.) The circuit court erred in overruling the third ground of the motion for a new trial, because, even if the original transaction and shipments were interstate commerce, the character of the transaction changed from interstate commerce to intrastate commerce when the said two cars were rebilled to Mount Pleasant from Columbia, as pointed out to the court in said third ground of said motion.

(4.) The circuit court erred in rendering said judgment and in refusing to set the same aside and to grant a new trial on the fourth ground of said motion stated therein, to-wit, because when said oils were put into said barrels and

then delivered to purchasers in Tennessee the said transaction lost its character as interstate commerce and the plaintiff therefore became liable for said privilege tax.

(5.) The circuit court erred, first in holding that the plaintiff under the facts disclosed at the trial was engaged in interstate commerce; second, it erred in holding that the said act of 1909, chapter 479, in its application to plaintiff was violative of the commerce clause of the Constitution; it again erred in the third instance, in entering said judgment in favor of the plaintiff and against the defendant, and likewise erred in the fourth instance in failing and refusing to render a judgment in favor of defendant and against the plaintiff, with costs.

See original record in this court, page 29.

Disposition of the Case.

The court, in reversing the judgment of the circuit court, and in deciding the case in favor of the defendant, said:

> "Save in one particular to be noted hereinafter, this case is similar to the case of Western Oil Refining Company *vs.* Lytle Dalton, Clerk of Trousdale County, 130 Tenn., p. —, decided at a former day of the term. In the case of Western Oil Refining Company *vs.* Dalton, *supra*, we concluded that the plaintiff was protected from the privilege tax sought to be imposed upon it by reason of the provisions of the commerce clause of the Federal Constitution as interpreted by the decisions of the United States Supreme Court referred to in the opinion therein. This case seems to be distinguishable from the case of Western Oil Refining Company *vs.* Dalton, *supra*, for the reason that the tank car from which distribution was made at Mount Pleasant came to Mount Pleasant under a local, or intrastate billing. The car was shipped from Indiana to Columbia, where a part of its contents were distributed and the car was then rebilled from there to Mount Pleasant.

> Columbia and Mount Pleasant are both towns within the State of Tennessee. We think that by reason of the manner in which this car was handled, the rebilling thereof at Columbia to Mount Pleasant, the plaintiff below became liable for the tax imposed by Chapter 279, acts 1909, upon persons, firms, partnerships, corporations, etc., delivering or distributing oil from a railroad car. It was a distributor at Mount Pleasant and the shipment came to Mount Pleasant under a local billing from another point within the State of Tennessee. We are of opinion that the case of Gulf Refining Company *vs.* Texas, 204 U. S., 412, 51 L. Ed. 546, justifies the distinction we have made."
>
> Tr., p. 11.

On May 15, 1915, plaintiff presented to the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, its petition for a writ of error to bring the case into this court for review.

Tr., pp. 3 and 4.

The assignments of error accompanying said petition are five in number, yet they in effect present in various forms the sole question that the Tennessee Supreme Court erred in holding that the rebilling and reshipping of said two cars from Columbia to Mount Pleasant, both in Maury County, Tennessee, after the contents of same had been partially unloaded at Columbia, and the delivery of the remaining contents thereof to citizens of Mount Pleasant in the manner described, was intrastate and not interstate commerce, and therefore rendered the plaintiff amenable to said tax.

Tr., pp. 5 and 6.

Thereafter an order was signed by the said chief justice granting said writ, and on May 26, 1915, Frank M. Thompson, the Attorney General of Tennessee, acknowledged the service of citation, thus placing the case in this court for review.

Tr., pp. 6 and 7.

IV.

ARGUMENT.

RULING OF TENNESSEE SUPREME COURT THAT THE REBILLING AND RESHIPPING OF SAID CARS FROM COLUMBIA TO MOUNT PLEASANT IN TENNESSEE WAS INTRASTATE AND NOT INTERSTATE COMMERCE IS CORRECT AND SUSTAINED BY AUTHORITY.

Putting aside for the present the ruling of the Tennessee Supreme Court, that said shipment to Columbia and the deliveries there constituted interstate commerce, and not intrastate commerce, for the reasons stated in the Dalton Case in 131 Tennessee, 329, and confining for the present the discussion to its ruling that the rebilling and reshipping of said cars from Columbia to Mount Pleasant and the deliveries at said latter place, constituted intrastate and not interstate commerce, it is desired to submit in support thereof the following considerations of both fact and law:

Facts Disclosed on This Branch of the Case.

The agreed state of facts upon which the Tennessee court acted disclose that in order for the plaintiff to secure a sufficient number of orders to make a full tank of oil to Maury County it was necessary for it to go further than the territory served by the railroads at Columbia and to invade the territory adjacent to Mount Pleasant, which is eleven and three-tenths (11.3) miles from Columbia, and which is on the same line of railroad and which is also in Maury County. It is further disclosed that the railroad company would not, in shipping these two cars, the one from Lawrenceville, Illinois, and the other from Indianapolis, Indiana, ship the same to Mount Pleasant with stop-over privileges at Columbia. Therefore the two cars

were shipped from Illinois and Indiana, respectively, to Columbia. The tank car arrived at Columbia five or six days before the car containing the barrels arrived at said town. The delivery, therefore, of the oil was delayed until the arrival of the car containing the barrels. After the delivery was begun it lasted eight days, making in all thirteen or fourteen days in perfecting these deliveries. The railroad charged the plaintiff $17.00 demurrage on the tank car and $11.00 demurrage on the car containing the barrels, or the sum of $28.00 so-called demurrage, but which in point of fact was but rent for the use of the cars standing on the tracks. After these deliveries and the consumption of these thirteen or fourteen days in making the same, at Columbia, these two cars, with the remainder of their contents, were then rebilled and reshipped from Columbia to Mount Pleasant, both points being within Maury County, Tennessee. Upon the arrival of the two cars at Mount Pleasant delivery of the oil and barrels was begun and completed in the manner and by the same process employed in the delivery at Columbia; that is, by drawing the requisite number of gallons of oil from the car tank and placing it in the barrel and delivering the same, thus filled with oil, to the purchaser, and accepting the money therefor for both the oil and the barrel. Now, it is insisted that even if the original transaction at Columbia constituted interstate commerce (which is denied), that nevertheless the oil and the barrels and the entire transaction lost their interstate commerce status when the two cars were rebilled and reshipped, and that the entire transaction of rebilling and reshipping and delivery at Mount Pleasant was intrastate commerce, as held by the Tennessee Supreme Court.

Gulf Railroad vs. Texas, 204 U. S. 412, 51 Law Edition, 546, Analyzed and Applied.

It is urged that the instant case falls clearly within the rule of the above-cited case.

The Hardin Grain Company, of Kansas City, Missouri, offered to sell to Saylor & Burnett, of Goldthwaite, Texas, a certain brand of corn at 86½ cents per bushel, for delivery on the railroad tracks at Goldthwaite, Texas, which offer was accepted by Saylor & Burnett. The Hardin Grain Company did not at that time have the corn. When its offer was accepted, however, it placed an order for the corn with the Harroun Commission Company, of Kansas City, Missouri, for the requisite number of bushels of corn to fill the order, at 75½ cents per bushel. Previous to the receipt of this order from the Hardin Grain Company the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, from Hudson, South Dakota. The corn was shipped from Hudson, South Dakota, to Texarkana, Texas, with stop-over privileges at Kansas City, Missouri, under a bill of lading which called for its delivery to the Harroun Company at Texarkana, Texas. Before it arrived at Texarkana bills of lading were made out for its continuous shipment from Texarkana, Texas, to Goldthwaite, Texas, for delivery to the Hardin Company, and to notify Saylor & Burnett. When the car arrived in its journey from Hudson, South Dakota, to Texarkana, Texas, it was transferred from the Kansas City Southern Railway (one of the roads which brought it from Hudson, South Dakota, to Texarkana, Texas), to the Texas & Pacific Railway (one of the roads which was to transfer it from Texarkana to Goldthwaite), without the seals upon the doors of the cars being broken and with the corn sacked and untouched. Upon the arrival of the cars at Goldthwaite, Texas, the railroad company refused to accept the rate fixed from Texarkana to Goldthwaite by the

railroad commission of Texas, upon the ground that it was an interstate shipment from Hudson, South Dakota, to Goldthwaite, Texas, and demanded a higher rate, which was the rate between Hudson, South Dakota, and Goldthwaite, Texas, or its proportion of said rate. Thereupon suit was filed by the railroad commission to collect the penalty fixed by a statute of Texas. The direct question involved was as to whether, although the cars made a continuous journey from Hudson, South Dakota, to Goldthwaite, Texas, but under separate bills of lading, the one from Hudson, South Dakota, to Texarkana, Texas, and the other from Texarkana, Texas, to Goldthwaite, Texas, were in interstate commerce or in intrastate commerce. Both the State court and this court held that the shipment from Hudson, South Dakota, to Texarkana, Texas, was an interstate shipment, but the shipment from Texarkana to Goldthwaite, Texas, was an intrastate shipment. They both held that the railroad was amenable to the penalty of the Texas statute.

This court stated the issues in the case as follows:

> "The corn was carried from Texarkana, Texas, to Goldthwaite, Texas, upon a bill of lading which upon its face showed only a local transportation. It is, however, contended by the railroad company that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwait, Texas; that such transportation was interstate commerce and that its interstate character was not affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite."

In dealing with these issues this court said:

> "It is undoubtedly true that the character of the shipment, whether local or interstate, is not changed by the transfer of title during transportation. But whether it be one or the other may depend upon

the character of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson, South Dakota, to Texarkana, Texas. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana; that is an interstate shipment. The control over the goods in process of transportation which may be repeatedly changed by sale, is one thing; the transportation is another thing, and follows the contract of shipment until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin Company changed, or offered to change the contract of shipment or the place of delivery. The Hardin Company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana; that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana, the transportation contracted for ended."

Gulf Railroad Company *vs.* Texas, 204 U. S., 412; 51 L. Ed., 546.

In holding that the shipment from Texarkana, Texas to Goldthwaite, Texas, under the second bill of lading and contract was an intrastate and not an interstate shipment, this court said:

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he had reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Com-

> merce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad company's having been finished, he must make a new contract for his carriage from Goldthwaite and that would be subject to the law of the State within which that carriage was to be made."

And again the court said:

> "The question may be looked at from another point of view: Supposing a car load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods reached Texarkana, to forward them to some other place outside of the State? To state the question, in other words—if the only contract of shipment was for local transportation, would the State law in respect to the mode of transportation be set to one side by a Federal law in respect to interstate transportation on the ground that the shipper intended after the one contract of shipment had been completed, to forward the goods to some place outside of the State?"
>
> Gulf Railroad Company *vs.* Texas, 204 U. S., 413; 51 L. Ed., 546.

It would seem that the foregoing statement of this court when applied to the facts of the instant case settles affirmatively the correctness of the conclusion reached by the Tennessee Supreme Court. The plaintiff discloses that it had made two contracts of shipment, one from Lawrenceville, Illinois, and the other from Indianapolis, Indiana, to Columbia. These contracts of shipment were made with the railroad company by the plaintiff and in its name, the goods being at all times the property of the plaintiff and not of the purchasers under the contracts or offers to buy. These, of course, in so far as the shipments themselves are con-

cerned, were interstate shipments. It intended, all the while, however, to rebill and reship these cars from Columbia to Mount Pleasant as a matter of convenience to itself in executing its scheme or method of the transaction of its business. It did, as a matter of convenience, and in furtherance of its own process and plans, reship from Columbia to Mount Pleasant to itself and in its name and on a new bill of lading the remaining contents of these barrels.

Now, if, as said by this court, it be true that there is no difference between an interstate passenger and interstate transportation, and if a passenger who had purchased a ticket at Hudson, South Dakota, to Texarkana, Texas, intending all the while when he reached Texarkana to go on to Goldthwaite, would not be entitled on his arrival at Texarkana to a new ticket from that point to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite, and if such transaction, to wit, the purchase of the new ticket from Texarkana, Texas, to Goldthwaite, Texas, was an intrastate transaction, then it is not perceived how it can be possible that this reshipping and rebilling under a new contract from Columbia to Mount Pleasant was not an intrastate transaction.

The contract or contracts between the plaintiff and the consumers for the purchase of this oil and these barrels cannot be read into and rendered a part of this intrastate contract and transportation between Columbia and Mount Pleasant, because there is no privity of contract shown between the consumers who gave the orders and the railway company which made the last contract with the plaintiff.

Ohio Railroad Commission vs. Worthington, 225 U. S., 101; 56 L Ed., Page 1004; Texas & New Orleans Railroad Company vs. Sabine Tram Company, 227 U. S., 112; 57 L. Ed., Page 442; Chicago, Milwaukee & St Paul Railroad Company vs. State of Iowa, 223 U. S., 334; 58 L. Ed., Page 988, Analyzed and Applied.

But it is said in argument that the three cases above cited militate against the ruling of the Tennessee Supreme Court, and that the reasoning of this court therein renders said ruling of the Tennessee Supreme Court erroneous, and that for this reason the case must be reversed.

In the Worthington case, *supra*, a rate of seventy cents per ton was imposed by the commission of Ohio on what was termed "Lake Cargo Coal" from a coal field in Ohio to the ports of Huron and Cleveland, on Lake Erie, for carriage thence by lake vessels. The shipper transported coal usually upon bills of lading to himself at Huron, in large quantities. This rate of seventy cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that this transportation to Huron was interstate carriage. This court distinguished this Worthington case from the Gulf, Colorado & Santa Fe Railway Co. *vs.* Texas case, which is relied upon here, saying first as to the latter case—

> "There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here (speaking of the Worthington case) a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the State destination."
>
> Ohio Railroad Commission *vs.* Worthington, 225 U. S., 109; 56 L. Ed., p. 1008.

In the Worthington case the shipment from the coal fields to Huron and the rate therefor included not only the transportation from the coal field to Huron, but also the placing of the coal in the vessel and the trimming of it in the vessel which was to carry it and did carry it on to its final destination outside of the State. In other words, the shipment and the rate therefor placed the coal on its final journey outside of the State, which rendered the transaction interstate and not intrastate commerce. It is not perceived how this can have any bearing, much less a controlling influence upon the instant case.

In the Sabine case, *supra*, which was a controversy over the rate upon lumber shipped from interior points to Sabine and there transported to foreign markets this court stated the issue in the following language:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign."
>
> Texas & New Orleans Railroad Company *vs.* Sabine Tram Company, 227 U. S., 126; 57 L. Ed., p. 448.

This Sabine case, *supra*, like the Worthington case, reviews at length the Gulf, Colorado & Santa Fe *vs.* Texas case, and reaffirms the same without limiting or in anywise

modifying it. So it is not perceived how this case can or does conflict with the holding of the Tennessee Supreme Court in the case at bar.

The case of Chicago, Milwaukee & St. Paul Railroad Company *vs.* State of Iowa was an effort to have set aside and vacated an order of the railroad commissioner of that State requiring certain roads to accept at Davenport, Iowa, carloads of coal which had come from the State of Illinois to Davenport, in Iowa, without reloading the same into the cars of the road accepting the coal for transmission to other points in Iowa. This court held that the shipments from Davenport to the other points in Iowa were intrastate shipments, and that the order requiring the railroads to accept the coal in the cars in which it was received, and forbidding the railroads from reloading it into their own cars, was a reasonable regulation, which did not pertain to interstate commerce. The court said:

> "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by the mere billing or forms of contract."

Again it said:

> "That commodities received on interstate shipments are reshipped by the consignees in the cars in which they are received to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same State from having an independent and intrastate character."
>
> Chicago, Milwaukee & St. Paul Railway *vs.* Iowa, 233 U. S., 343; 58 L. Ed., p. 993.

It is submitted that the reasoning of the court in this case even more strongly supports the reasoning of the Tennessee Supreme Court than does the case of Gulf, Colorado & Santa Fe Railroad *vs.* Texas, and instead of the same being authority against the ruling of the Supreme Court of Tennessee it is authority in support of said ruling.

Therefore, upon this branch of the case it is submitted that there is no error disclosed in the record, and that the judgment of the Supreme Court of Tennessee should be affirmed with costs.

V.

The Original Shipments to and Deliveries at Columbia Constitute Intrastate and Not Interstate Commerce, and for This Reason the Judgment of the Tennessee Court Must be Affirmed.

Under the judiciary act the writ of error in this case has the same effect as if the judgment of the Tennessee Supreme Court complained of had been rendered in a court of the United States, and this court may affirm, reverse, or modify said judgment and may, at its discretion, either enter final judgment and award execution or may remand the case to said court from whence it came.

Under this writ it is essential, of course, to the jurisdiction of this court that it shall appear that a Federal question was decided by the State court against the rights claimed or asserted by the plaintiff in error under the Federal Constitution. When this appears, if it finds that this question was rightly decided, the judgment must be affirmed. If it appears that it was wrongfully decided, then this court will further inquire whether there is any other matter or issue adjudged by the said court sufficiently broad to maintain the judgment, notwithstanding the error committed by the State court as found by this court. This is true, even though the issues or additional matter were not directly passed on by the State court.

Murdock *vs.* Memphis, 87 U. S., 590; 22 L. Ed., 429.

Walter A. Wood *vs.* Keiner, 139 U. S., 293; 35 L. Ed., 193.

So that even if this court should reach the conclusion that the rebilling and reshipping of these cars from Columbia to Mount Pleasant was not an intrastate transaction, and that the distinction taken by the Tennessee Supreme Court under the Gulf, Colorado & Santa Fe Ry. *vs.* Texas case, is not well founded, but should at the same time conclude that the Tennessee Supreme Court was in error in holding the original shipment and deliveries to Columbia to be interstate and not intrastate commerce, then it would affirm the case under the foregoing authorities.

The Tennessee Supreme Court said that the instant case was in all respects save one similar to the Western Oil Refining Company *vs.* Dalton case, and that in that case it concluded that the plaintiff was protected from the privilege tax sought to be imposed upon it by reason of the provisions of the commerce clause of the Federal Constitution, as interpreted by the decisions of this court referred to in that opinion. The court further said that this case was distinguishable from the Dalton case by reason of the reshipment from Columbia to Mount Pleasant, thereby affirming its previous holding in the Dalton case, that the shipment of the oil to Columbia and the delivery there to the consumer constituted interstate and not intrastate commerce.

Western Oil Refining Company vs. Lytle Dalton, 131 Tennessee, 329, Analyzed.

The court in the Dalton case stated the issues as follows:

> "The contentions of the defendant clerk in support of the taxing power of the State are that the mode of shipment was a scheme or device adopted by the oil company to evade or circumvent the tax laws of this State, within the scope of the ruling in the case of Austin *vs.* Tennessee, 179 U. S., 359; 21 Sup. Ct., 132; 45 L. Ed., 232; and further, that in the transfer of oil from tank cars into barrels at Hartsville, in this State, the commodities (oil and barrels) had

come to rest in this State from course of commerce, and were thus so 'acted upon' by the consignor as that the original package, the tank, was broken, and new packages created, thus losing to the commodities their distinct character of interstate shipments, and bringing them within the range of local taxation, within the claimed meaning of Brown *vs.* Maryland, 12 Wheat., 443; 6 L. Ed., 678, and May *vs.* New Orleans, 178 U. S., 501; 20 Sup. Ct., 976; 44 L. Ed., 1167.

"These contentions of the defendant clerk must be tested as to soundness by several rulings made in recent cases by the Supreme Court of the United States, in which the character of commodities has been considered in such connection, and defined with no inconsiderable nicety."

Western Oil Refining Co. *vs.* Dalton, 131 Tennessee, pp. 333 and 334.

The court then analyzes two sets of cases, and quotes from seven cases decided in this court, each of which will be hereinafter dealt with, the first set being the group dealing with the sale of pictures and frames and certain ranges or stoves, or other merchandise, and the last one dealing with the storage of certain oils of the Central Oil Company at Memphis. The court then says:

"We think it apparent that, as between the rulings in the first set of cases and in the last quoted from, the correct decision of the pending case must depend upon a close differentiation, in the attempted making of which we could wish that the Federal tribunal had spoken more pointedly in the case of Crenshaw *vs.* Arkansas, or in Stewart *vs.* Michigan, touching the test conceived to have been formerly applied by it—the preappropriation of the commodities to respond to the order of the bargaining customer.

"If we treat this test as one now discarded, we still arrive at the conclusion that the oil and barrels were within the protection of the commerce clause of the Federal Constitution. Although there were two shipments, the one from Indiana and the other from

> Illinois, each was but a part of the bargain of a sale that required interstate transportation to consummate. The barrels were to be offered and received 'as a part of a transaction commercially continuous.'"
>
> Western Oil Refining Co. *vs.* Dalton, 131 Tenn., 341.

It is asserted that this ruling of the Tennessee Supreme Court on this branch of the case is erroneous, for the following reasons:

(1.) It is admitted that the negotiations for the sale of goods which are in another State, for the purpose of introducing them into the State where the negotiation is made, is interstate commerce and cannot be taxed or burdened or restricted by the State.

(2.) It is admitted further that whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. This movement, however, does not begin until the article has been shipped or started for transportation from one State to another. Until the commodity is shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

(3.) Commerce is intercourse; one of its most ordinary ingredients is traffic; therefore, the power to authorize this traffic, given as it is in the most comprehensive terms by the Constitution, and with the intention that its efficacy should be complete, carries with it the right of sale, which is of course the object of importation, and which is an essential ingredient of the intercourse. It is from this principle, enunciated so often by this court, that the doctrine of sales in original package springs.

(4.) While, therefore, it is conceded that the plaintiff would have a right to sell both its oil and barrels transmitted

from Indiana and Illinois into Tennessee in the original package in which they were sold, yet it is asserted:

(*a*) That the tank, in the case of the oil, and the empty barrels, in the case of barrels, constitute the original packages within the meaning of the law.

(*b*) That the processes and steps taken of drawing the oil from the tank into the barrels broke these original packages and created a new package consisting of the barrel filled with the oil, which commingled the property with the balance of the property of the State and left it subject to the State laws.

(*c*) That this method and procedure of shipping the oil in the tank and the empty barrels in another car and filling the barrels from the tank before they left the cars was a thinly veiled device and fraudulent scheme to evade the taxing laws of the State.

(*d*) That by this process the plaintiff "so dealt" with the oil and the barrels as to cause them to lose their status of original packages in interstate commerce, and therefore the protecting shield of the Federal Constitution, and subjected them to the operation of the State law and to said tax.

(*e*) That if these orders be construed as contracts between the purchasers and the plaintiff, under which it was to deliver to them at Columbia and Mount Pleasant the respective number of gallons of oil contained in each order, enclosed within the barrel or barrels mentioned in each order, that then there was not an appropriation of any specific number of gallons of oil in the tank, or of any specific barrel, to the fulfilment of any one of these contracts so as to bring the case within the rules of either the picture-frame cases or the stove and range cases.

(*f*) That if these orders be treated as separate and distinct; that is, if the order be treated as one for the delivery of fifty gallons or any other number of gallons of oil to be

delivered at Columbia or Mount Pleasant, without regard to the barrels, and if the order for the barrels be treated as separate and distinct, without regard to the oil, then upon their arrival their character in interstate commerce ceased. The service, then, of placing the oil in the barrels would be a service subsequent to the interstate transportation of the article. That when a service like this is wholly within the State it is presumably subject to State control. That being subject to State control, the burden is upon the plaintiff to show that though actually within the State, it is legally outside of it. That in such event, unless the interstate character of the article and the transaction is established, locality determines the question of jurisdiction.

VI.

Doctrine of Original Package in its Application to the Instant Case Discussed.

Discussing proposition "*a*" above, that the tank car, in the case of the oil, and that the empty barrels, in case of the car of barrels, constituted the original packages in the sense of the law, the following is submitted:

This court, in discussing the question of what is an original package, in the leading case, and quoting from the Supreme Court of Louisiana, used this language:

> "The question then which the case really presents is, what is the original package? Is it the package in which the goods are put up for convenience by the firm or manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package in the legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package, then plaintiff's objection to the assessment complained

of is well taken. If the case or box in which the goods are placed for shipment be the original package, then this case falls.

"After referring to some of the adjudged cases, the court said that the authorities supported the contention of the city, that the original package in this case must be held to be that in which the goods were shipped to and received by the plaintiffs, and not the small packages put up by the manufacturer and packed in the boxes delivered to the carrier."

May *vs.* New Orleans, 178 U. S., 501; 44 L. Ed., 1167.

And again, quoting from the Supreme Court of Pennsylvania, in another case, this court said:

"An original package is defined to be such form and size of package as is used by producers and shippers for the purpose of securing convenience in handling and security in the transportation of merchandise between dealers in the original course of actual commerce."

Austin *vs.* Tennessee, 179 U. S., 356 and 357; 45 L. Ed., 231.

And again:

"Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries."

Austin *vs.* Tennessee, 179 U. S., 351; 45 L. Ed., 229.

Then, under these cases it is too clear for further discussion that the car tank in which this oil was shipped, and the barrels which were shipped in one car for the convenience, profit and advantage, as the agreed state of facts of the plaintiff discloses, are, in contemplation of the law as adjudged by this court, the original packages. It is freely conceded that plaintiff could have sold said tank of oil or any one of said empty barrels, they being the original packages,

to any user or consumer of oil in barrels in Tennessee, and that such transaction would have been interstate commerce.

By Drawing the Oil from the Tank into the Barrels These Original Packages Were, as a Matter of Fact, Broken, and a New Package Created. At the Same Time Plaintiff so "Acted upon" Both the Oil and the Barrels as to Cause Them to Lose Their Interstate Status.

Coming then to propositions "*b*" and "*d*," which will be discussed together, the following is submitted:

(1.) If the foregoing proposition that the tank and the empty barrels were in law the original packages, then, as a matter of fact, regardless of any legal question, these original packages, to-wit, of the oil in bulk in the tank and the empty barrels, were by the process converted into a new package, consisting of the barrel with the oil enclosed therein. This new package, when it was completed, became a new and distinct *specie* of property, combining for its elements of value the price of the barrel and the price of the oil therein, which was commingled with and became a part of the common mass of property of the State, and subject to the ordinary inspection and taxing laws.

(2.) If the first proposition be true, that this tank with the oil in bulk therein and the empty barrels were the original packages, then the plaintiff, by drawing the oil from the tank into the barrels, so "acted upon" the same under the decisions of this court, as to cause them to lose their interstate *status*.

This court, in the May case, *supra*, quoting from Brown *vs.* Maryland, used this language:

> "These extracts from the opinion of Brown *vs.* Maryland, establish the following propositions: (1) That the payment of duties to the United States gives the right to sell the thing imported, and that such

right to sell can not be forbidden or impaired by the State. (2) That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported, is a duty on imports within the meaning of the Constitution. (3) That a State can not, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports and have become from that time subject to State taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute in the way of taxation to the support of the government which protects the owner in his person and estate. So the question in the present case is whether the plaintiff, prior to the assessment complained of, had so acted upon the goods imported by them as to incorporate them with the mass of the property in the State, and bring them, while in their possession, within the range of local taxation."

May *vs.* New Orleans, 178 U. S., 507, 508; 44 L. Ed., 508.

Again, in the Austin case, *supra*, this court said:

"It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the State, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

And, again he says:

> "Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the chief justice that by a skillful alteration of the size of the package the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several States."
>
> Austin *vs.* Tennessee, 179 U. S., 351; 45 L. Ed., 229.

It is submitted, therefore, that this plan and scheme of shipping this oil from one State into Tennessee in a car tank and the empty barrels from another State in another car and then drawing the oil from the tank into the barrels, did create, as a matter of fact, independent of any rule of law, not only a new and distinct package, but a separate and distinct property, both in its elements and value, to-wit, the barrel with the oil therein, the separate values of which become commingled into one value by the transformation.

It is further submitted that by this transformation and process the plaintiff, under the rule announced in both the May and Austin cases, "so acted upon" the oil and barrels as to cause them to lose their status as original packages, and by creating them into a new package commingled them with and rendered them a part of the common mass of property in the State, and therefore amenable to said tax.

Said Method of Dealing with Said Oil and Barrels a Fraudulent Scheme under the Rules and Decisions of This Court.

Coming then to proposition "*c*" above, that this method was but a thinly-veiled device and fraudulent scheme to evade the taxing laws of the State, the following is submitted:

(1.) This court, in dealing with this original-package question, and the fact that certain cigarettes had been shipped in small packages contained loosely in a basket, used this language:

> "But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started throughout the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. * * * Without undertaking to determine what is the size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee."
>
> Austin *vs.* Tennessee, 179 U. S., 359-60; 45 L. Ed., 232.

Then, dealing with the power of the court to meet such condition, it was further said:

> "This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes, from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his

stock outside the State and import it in minute quantities."

Austin *vs.* Tennessee, 179 U. S., 360-361; 45 L. Ed., 232-233.

These two cases of May and Austin, *supra,* demonstrate the question as to what an original package is and the power of this court in dealing with the same.

In the May case it was contended that the original package put up by the manufacturer, although in large numbers, in boxes for shipment should be treated as the original package after their arrival here and while they were on the shelves in the store of the importer. The court condemned this contention.

In the Austin case it was sought to have the court hold that cigarettes in packages of ten, as originally manufactured, should be treated as the original package and carry with them the right of sale in the State contrary to its laws. The court condemned this contention.

In the instant case, although the agreed state of facts disclosed that it is customary and usual to ship oil in these car tanks, and that such shipments are made for the convenience and safety of the plaintiff, yet to evade the taxing laws of the State this plaintiff claims the right, after the oils have reached Tennessee and while they yet remain upon the car, to draw it from the tank into the barrel and to treat the oil and the barrel thus united as the original package. In addition to its failure to be the original package at the initial shipping point, as a fact it is not the original package as insisted, in contemplation of law, either at the original shipping place or the point of destination.

It is submitted on behalf of this clerk for the State of Tennessee that the instant case falls directly within the rules and principles enunciated in the Austin case, *supra.*

No Pre-appropriation of Any Specific Property by Said Orders.

Coming to proposition "*e*" above, that if these orders be construed as contracts between the purchasers and the plaintiff, under which it agreed to deliver at Columbia and Mount Pleasant the respective number of gallons of oil contained in each order, enclosed within the barrel or barrels mentioned in each order, that there was not a specific appropriation of any specific number of gallons of oil in the tank or of any specific barrel to the fulfilment of any one of these contracts, the following is submitted:

(1.) The Supreme Court of Tennessee in the Dalton case reviewed the following cases upon this point:

Caldwell *vs.* North Carolina, 187 U. S., 625; 47 L. Ed., 338.

Rearick *vs.* Pennsylvania, 203 U. S., 510; 51 L. Ed., 296.

Dozier *vs.* Alabama, 217 U. S., 127; 54 L. Ed., 966.

Crenshaw *vs.* Arkansas, 227 U. S., 384; 57 L. Ed., 565.

Stewart *vs.* Michigan, 232 U. S., 665; 58 L. Ed., 786.

The case of Caldwell *vs.* North Carolina is distinguishable from the instant case in many respects. The Supreme Court of North Carolina took the position, first, that inasmuch as the right was reserved to the purchaser to accept or reject the frame when it came, that the title thereto did not pass until the delivery of the picture in the frame in North Carolina, and therefore it was an intrastate and not an interstate transaction; and second, that the transaction was not completed until the picture was placed in the frame, and that this was done in North Carolina, which rendered it an intrastate transaction. This court said:

> "That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing, handling and 'placing the pictures in their proper places,' (the language of the verdict) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture."

This was but simply declaring that the purchase of the picture and the frame with each picture in the particular frame designed for it was but one transaction, and which transaction was, as will be seen in another case, termed "commercially continuous."

In the case of Rearick *vs.* Pennsylvania, the brooms in question were appropriated specifically to the fulfilment of the contract by the same being marked with the initials of the purchaser thereon.

In the case of Dozier *vs.* Alabama it was held that the purchase of the frames and pictures was one transaction and that it was "commercially continuous." In this case the court expressly recognizes the doctrine as is insisted, that there must be a specific appropriation of specific property to the fulfilment of the contract in order to protect the property and transaction under the commerce clause of the Constitution.

In the case of Crenshaw *vs.* Arkansas it was unnecessary to discuss the question of the appropriation of any specific property to the fulfilment of the contract, because each range or stove sold to the consumer was shipped and delivered to him in his home in the exact condition, without change of any kind, that characterized it when its manufacture was completed. In other words, the contract called for the manufacture and delivery of the specific character and kind of stove or range. This stove, exactly in the condition in which it was manufactured, was delivered by the manufacturer himself to the consumer in his home; the only point in the Crenshaw case being that the manu-

facturer used two instead of one carrier to make delivery. The facts of that case, it is insisted, did not call for a discussion of the question of the appropriation of any specific property to the fulfilment of a specific contract in order to protect the transaction under the commerce clause of the Constitution.

The last case reviewed by the Tennessee Supreme Court is that of Stewart *vs.* Michigan. There is, it is true, no discussion in this case of the doctrine here under consideration, but it is insisted that this court did not mean in that case to abandon the doctrine, or if it did, that then the same should be overruled and corrected.

The court on this branch of this case was dealing with two propositions: First, the charge of the circuit judge to the jury directing a verdict under the facts and the affirmance thereof by the Supreme Court of the State; and, second, the admission in argument at bar that the judgment below, in so far as it affirmed the action of the trial court in holding that there could be a conviction because of the deliveries of merchandise from the cars to fill orders previously solicited and obtained, was erroneous because in conflict with the commerce clause of the Constitution.

The court simply held on the first proposition that the charge of the circuit judge and the affirmance thereof by the Michigan Supreme Court was in conflict with the case of Crenshaw *vs.* Arkansas, *supra*. That case recognized the doctrine of a pre-appropriation of specific property to the fulfilment of a specific contract.

On the second proposition this court merely endorsed the admission made by counsel in argument at the bar as above stated.

So it is insisted that it was not the purpose of this court to abandon the doctrine so often announced by it, that there must be a pre-appropriation of specific property to the fulfilment of a specific contract, to give the transaction an interstate status. It is next insisted that if it be the purpose

of the court to overrule this line of cases and this doctrine, that it will give fully and specifically the reasons therefor.

For the foregoing reasons it is insisted that the Supreme Court of Tennessee was in error in discarding the test of the appropriation of property to the fulfilment of a contract, in the first instance, and in the second instance in holding that these barrels and oils were within the protection of the commerce clause of the Federal Constitution.

It is next insisted that the Supreme Court of Tennessee was in error in holding that these two shipments, one from Indiana and the other from Illinois, were each but parts of a sale, and that the transaction was "commercially continuous." It is contended that the test is as to whether or not there is an appropriation of any specific property to the fulfilment of an interstate contract of sale is still the law. Next, it is contended that it was impossible for any specific portion of this oil to have been appropriated to any one of these contracts, either under the shipment to Columbia or under the second shipment to Mount Pleasant. It is further contended that there is no sentence, word or letter in any of these contracts which indicated or indicates that the purchase of the oil and of the barrels is an entire, inseparable contract or transaction, or that the delivery of the oil in the barrels was contemplated or that the transaction should remain continuous and incomplete until the oil was placed in the barrels, and that for all of these reasons the Supreme Court of Tennessee erred in holding otherwise.

It is next contended that even if the shipment from Columbia to Mount Pleasant did not give the transaction an intrastate status, and that for this reason the holding on this point by the Supreme Court of Tennessee was error, still the original transaction, being, for the reasons herein stated, an intrastate and not an interstate transaction and business, that the court will affirm the decree, there being sufficient grounds to warrant such holdings.

Treating These Orders as Separate and Distinct, upon Arrival of the Oil and the Barrels in Separate Cars the Interstate Journey Ended. Then the Service of Filling the Barrels from the Tank Was a Service Subsequent to the Interstate Status of the Oil and Barrels.

On this branch of the case the following is submitted: From the face of these orders themselves they should be treated as separate and distinct; that is, each should be treated as an order for the delivery of the number of gallons of oil stated therein, without regard to the barrels, and likewise for the delivery of the number of barrels mentioned therein without regard to the oil. This would be the natural and logical construction to be given from the face of the order, because the oil in the face of the order is sold at so much per gallon and the barrels are sold at $5.50 each. There is nowhere any reference in the order to the fact that the oil was to be contained in the barrel, or that the barrel at the price of $5.50, should contain any oil.

Reading the order, then, aside from what was actually done at Columbia and Mount Pleasant by the plaintiff in filling the barrels from the tank, no court could gain the conception that this transaction contemplated that the oil should be delivered in the barrels or that the barrels should be delivered full of oil.

Now, if this be the proper interpretation of the order, then upon the arrival of the oil at Columbia or at Mount Pleasant, its interstate shipment ceased and it lost its distinctive character in interstate commerce. The same is true of the barrels also. The service of this plaintiff to its customers in drawing this oil from the tank into the barrels was rendered wholly within the State of Tennessee and had no contractual on necessary relation to the interstate transportation of the oil from Lawrenceville, Illinois, to Columbia or Mount Pleasant, or of the barrels from Indianapolis, Indiana, to Columbia or Mount Pleasant. This service, then,

of filling the barrels from the tank, in this aspect of the case, would be a service subsequent to the interstate transportation of these articles.

When a service like this is wholly within the State, it is, under the rules of this court, presumably subject to State control. This being true, the burden is upon the plaintiff to show that, although actually within the State it is legally outside of it. In this view and aspect of the case, which was not considered, passed upon or decided by the Supreme Court of Tennessee, the case falls, as is insisted, clearly within the rule announced in the following cases:

Pullman Company *vs.* Adams, 89 U. S., 419; 47 L. Ed., 877.

Pennsylvania Railroad *vs.* Knight, 191 U. S., 271; 48 L. Ed., 327.

Under the rule in these cases this plaintiff, knowing that this privilege tax was placed upon all persons selling oil in Tennessee from tank cars and tanks, could not adopt this method under the guise of a legal right to deliver to each purchaser the oil and barrels, and thereby claim that the service of transmitting oil from the tank to the barrel was a portion of the process, or one of the steps of interstate transportation, and that therefore the same was necessarily connected with and a part of an interstate transaction, sale and delivery.

For the foregoing reasons, therefore, this judgment of the Tennessee Supreme Court should be affirmed.

VII.

Conclusion.

If the Tennessee Supreme Court has rightly construed the decisions of this court, and if this method of shipment and delivery of oils into Tennessee constitutes interstate commerce, then every oil company in the United States can,

by adopting it, evade both the taxing power and the police power of every State in the Union for the taxation of the business of selling oil and for the regulation and inspection of oil for the safety of their citizens.

If it be true that this court takes judicial cognizance of its own records and decisions and of the published public acts of the different States, then it knows that, in addition to the tax levied by this act in question, Tennessee, like practically every other State in the Union, has a system of inspection to preserve the safety and lives of its citizens, whereby all oils sold in Tennessee are inspected. If by this device this company may escape this tax, it can likewise evade the inspection laws of the State and sell to the citizens of the State oils which would not stand the test of proper inspection.

The records of this court in the case of General Oil Company *vs.* Crain, 209 U. S., p. 212; 52 L. Ed., p. 754, discloses the nature of these inspection laws and the construction thereof placed upon them by this court. Indeed, the ability through this scheme to evade these inspection laws is much more vital to the consumers of oils in Tennessee than is the tax involved under this revenue statute. It is partly on this account that this phase of the case has been pressed upon the attention of the court.

It is submitted that this case, therefore, presents this attitude:

(1.) Plaintiff secured a number of these contracts adjacent to Columbia and Mount Pleasant, in Maury County, Tennessee. It shipped a car tank full of oil from Lawrenceville, Illinois, to Columbia, Tennessee, which tank was, under the law and within the meaning of the Constitution as construed by this court in the foregoing cases, an original package.

(2.) It shipped from Indianapolis, Indiana, to Columbia, Tennessee, a carload of steel barrels, each of which said bar-

rels constituted the original package within the meaning of the Federal Constitution as construed in the foregoing cases.

(3.) It then broke both of these original packages by drawing the oil from the tank and placing it in the barrel, thus producing a new and distinct package, with different elements of value from either of the original packages, thereby commingling said new packages with the balance of the property of the State, and subjecting it to State regulations.

(4.) In doing this it not only so acted upon both the oil and the barrels as to cause the same to lose their interstate status, but is attempting to carry out a device or artifice in evasion of the revenue laws of the State.

(5.) After disposing of probably half of the oil and of the barrels at Columbia, it then rebilled and reshipped the same under a new contract from Columbia to Mount Pleasant, which was, as held by the Supreme Court of Tennessee, an intrastate and not an interstate shipment.

(6.) Upon the arrival of the cars at Mount Pleasant it proceeded in the same way to so act upon these original packages as to convert them into a new package, both in point of fact and law, and continued to perpetrate this scheme for the evasion of the revenue laws of the State.

(7.) It is therefore submitted that there is in this record ample facts and law to lead the judgment of this court to an affirmance of the judgment of the Tennessee Supreme Court.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General for Tennessee.

WESTERN OIL REFINING COMPANY *v.* LIPSCOMB, CLERK OF THE COUNTY COURT OF MAURY COUNTY, TENNESSEE, AS SUCCESSOR OF THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 168. Submitted March 23, 1917.—Decided June 4, 1917.

It is the essential character of commerce which determines whether it is interstate or intrastate, and not the accident of through or local bills of lading.

Where commodities are in fact destined from one State to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder.

Plaintiff, an Indiana corporation, for the purpose of filling orders taken by its salesmen in Tennessee, shipped into that State a tank car of oil and a carload of barrels and filled the orders from the cars through a traveling agent, who drew the oil from the tank into the barrels, or into others furnished by the customers, and made delivery to the latter, collecting the price at the time. The cars were billed to the plaintiff to a point in Tennessee where part of the orders was filled, and thence rebilled to the plaintiff to another point in that State where the remaining orders were filled and the supply of oil and barrels exhausted, this in pursuance of plaintiff's plan and intention at the time of original shipment that the cars should remain at the first place only long enough to fill the orders from there and should then proceed to the second. *Held*, that the movement of the goods to the first place and its continuance thence to the second were connected parts of a continuing interstate commerce movement to the latter, and that plaintiff could not be subjected to an occupation or privilege tax under the law of Tennessee because of the sales consummated at either destination.

Reversed.

THE case is stated in the opinion.

Mr. H. C. True and *Mr. A. L. Dorsey* for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit by an Indiana corporation to recover money paid under protest as an occupation or privilege tax in Tennessee. The plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana and was selling the products of its refinery and factory upon orders taken by traveling salesmen in its employ. For the purpose of filling orders so taken in Maury County, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to the plaintiff at Columbia, in that county, and, after the orders from that place were filled, were rebilled to the plaintiff at Mount Pleasant, in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent of the plaintiff and the purchase price was collected at the time—this being what was contemplated when the orders were taken. If the order was for both oil and barrels the oil was drawn out of the tank car into the barrels and the two were jointly delivered, and if oil alone was ordered it was drawn from the tank car into barrels otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and the plaintiff intended that they should remain at Columbia only long enough to fill the orders from that place and then should be sent to Mount Pleasant so the orders from that place could also be filled. The quantity of oil and the number of barrels required to fill the orders from Mount Pleasant were in the cars continuously from the time of the original shipment

until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank or warehouse in that State.

The statute, c. 479, Acts 1909, § 4, under which the tax was exacted and paid, provides:

"Each and every person, firm, partnership, corporation, or local agent having oil depots, storage tanks, or warehouses for the purpose of selling, delivering, or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purposes, shall pay a privilege tax as follows."

The objection made to the tax, as applied in the circumstances stated, was that it was a tax upon interstate commerce and therefore violative of the commerce clause of the Constitution. In the county court judgment was given for plaintiff and this was reversed by the Supreme Court of the State, which held, first, that what was done up to and including the filling of the orders from Columbia was interstate commerce and the State could not exact a privilege tax therefor consistently with the commerce clause of the Constitution (see *Western Oil Refining Co.* v. *Dalton*, 131 Tennessee, 329), and, second, that what was done thereafter—rebilling and forwarding the cars from Columbia to Mount Pleasant and then filling the orders from that place—was intrastate commerce and afforded an adequate basis for exacting the tax.

Of the first part of the decision it is enough to say it is supported by a long line of adjudicated cases in this court, among them being these: *Caldwell* v. *North Carolina*, 187 U. S. 622; *Dozier* v. *Alabama*, 218 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Stewart* v. *Michigan*, 232 U. S. 665.

In the second part of the decision we think the court erred. Unlike *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403, this is not a case where at the time of the

original billing the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana Railroad Commission* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, 343; *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, 545.

Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same State; and this is what actually was done. Columbia was the destination of only a part of the merchandise, not of all. As to part it was merely the place of a temporary stop en route. The orig-

inal billing to Columbia and the rebilling from there to Mount Pleasant operated in the same way as would an original billing to Mount Pleasant with the privilege of stopping en route at Columbia to deliver a part of the merchandise. Indeed, it is stipulated that the reason for not billing the cars through to Mount Pleasant in this way was because the carriers receiving the shipments "would not allow such stop-over privilege, though the same is allowed on nearly every other kind of shipment." Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place.

It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void.

Judgment reversed.

The CHIEF JUSTICE dissents, being of opinion that the case is controlled by *May* v. *New Orleans*, 178 U. S. 496.